Corpus Juris Secundum
Database updated June 2011

Trusts

John Bourdeau, J.D., Paul M. Coltoff, J.D., William H. Danne, Jr. J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., William Lindsley, J.D., Eric Mayer, J.D., Tom Muskus, J.D., and Eric C. Surette, J.D.

Correlation Table

Summary

Scope:

This title discusses the nature and incidents of estates in property in which the legal title or power of disposition is held by one or more persons wholly or in part for the use of another or others, under an equitable obligation, express or implied, resting upon such person by reason of the confidence reposed in him or her, to convey, apply, or deal with such property or its profits at the will or for the benefit of such other person or persons according to the confidence so reposed. Rights, powers, duties, and liabilities of persons creating such trusts, of trustees, and of beneficiaries in general are also discussed, as is judicial protection and control of trust property and trustees, and remedies and proceedings relating to trusts.

Treated Elsewhere:

"Massachusetts trusts," see C.J.S., Business Trusts §§ 1 et seq.
Testamentary trusts, see C.J.S., Wills §§ 1425 to 1513
Trust deeds, see C.J.S., Mortgages §§ 15 to 18
Trusts for Accumulation, see C.J.S., Perpetuities §§ 43 to 49
Trustees of charitable trusts, see C.J.S., Charities §§ 17 to 21
Voting trusts, see C.J.S., Corporations §§ 467 to 471

Research References:

Westlaw Databases

All Federal & State Cases (ALLCASES)

All Federal Cases (ALLFEDS)

American Law Reports (ALR)

West's A.L.R. Digest (ALRDIGEST)

Code of Federal Regulations (CFR)

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A.L.R. Index, Constructive Trusts

A.L.R. Index, Resulting Trusts

A.L.R. Index, Spendthrift Trusts

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§ 1. Trust

West's Key Number Digest

West's Key Number Digest, Trusts 1

A trust is defined as the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title to which is vested in another, but the word "trust" also is frequently employed to indicate duties, relations, and responsibilities which are not strictly technical trusts.

In general terms, a "trust" may be defined as the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another.[FN1] Specifically, a trust is a fiduciary relationship with respect to property subjecting a person by whom the property is held to equitable duties or obligations to deal with the property for the benefit of another person.[FN2]

In a popular sense, the word "trust" covers many things besides legal technical trusts[FN3] and is frequently employed to indicate duties, relations, and responsibilities which are not strictly technical trusts.[FN4] However, properly speaking, in order to give rise to a trust, there must be something more than a confidence reposed by one person in another.[FN5]

Trusts have been distinguished from various other legal relationships, such as an agency,[FN6] an annuity,[FN7] a bailment,[FN8] or a charge.[FN9] A distinction has also been drawn between a trust and a guardianship or conservatorship,[FN10] a contract,[FN11] a gift inter vivos,[FN12] a mortgage,[FN13] a partnership,[FN14] and a sale of personalty.[FN15] A trust is distinguishable from a debt,[FN16] in that a debt does not necessarily involve specific subject matter and that the debtor's obligations are legal and the debtor's relation not fiduciary, while the trustee's obligations are equitable and his or her relation fiduciary.[FN17] Further, a debt, in the technical sense, is money due or owing on account of a contract, expressed or implied, while a trust, strictly speaking, is an obligation arising out of a confidence reposed in a person to whom the legal title to property is conveyed on the condi-

tion that he or she will faithfully apply it according to the direction and risks of the vendor.[FN18] Wills and trusts are not the same, and different legal rules govern each, as trusts come to immediate effect upon being established and funded, while wills never take effect until the testator's death.[FN19]

An "inter vivos trust" is a trust that is created and becomes effective during the lifetime of the grantor or settlor.[FN20]

The term "fidei-commissum," in the civil law, refers to an arrangement resembling the "trust" of English equity, although the arrangement is increasingly out of course.[FN21]

[FN1] Ohio—Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 (2008).

Similar definition

U.S.—In re Williams, 290 B.R. 83 (Bankr. E.D. Pa. 2003).

[FN2] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

Md.—From the Heart Church Ministries, Inc. v. Philadelphia-Baltimore Annual Conference, 184 Md. App. 11, 964 A.2d 215 (2009), cert. denied, 408 Md. 148, 968 A.2d 1064 (2009).

Neb.—Karpf v. Karpf, 240 Neb. 302, 481 N.W.2d 891 (1992).

Similar definitions

(1) A "trust" is any arrangement which exists whereby property is transferred with an intention that it be held and administered by the transferee or trustee for the benefit of another.

Cal.—Presta v. Tepper, 179 Cal. App. 4th 909, 102 Cal. Rptr. 3d 12 (4th Dist. 2009).

(2) A trust is an equitable obligation, either express or implied, placed on a person by reason of a confidence placed in her or him to hold the property for the benefit of some other person or for the benefit of the trustee and others.

Or.—Connall v. Felton, 225 Or. App. 266, 201 P.3d 219 (2009), review denied, 346 Or. 257, 210 P.3d 905 (2009).

[FN3] U.S.—Central Life Assur. Soc. v. Birmingham, 48 F. Supp. 863 (S.D. Iowa 1943), judgment aff'd, 141 F.2d 116 (C.C.A. 8th Cir. 1944).

Pa.—Brunner v. Edwards, 337 Pa. 513, 12 A.2d 36 (1940).

[FN4] Del.—Maull v. Stokes, 31 Del. Ch. 188, 68 A.2d 200 (1949).

[FN5] N.Y.—In re Arons' Estate, 121 N.Y.S.2d 512 (Sur. Ct. 1953).

[FN6] C.J.S., Agency § 23.

[FN7] C.J.S., Annuities § 6.

[FN8] C.J.S., Bailments § 8.

[FN9] Cal.—Woodley v. Woodley, 47 Cal. App. 2d 188, 117 P.2d 722 (1st Dist. 1941).

Miss.—Ogle v. Durley, 223 Miss. 32, 77 So. 2d 688 (1955).

Equitable lien

Cal.—Jones v. Sacramento Sav. & Loan Ass'n, 248 Cal. App. 2d 522, 56 Cal. Rptr. 741 (3d Dist. 1967).

[FN10] Miss.—Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 (Miss. 1999).

[FN11] Cal.—Waverly Productions, Inc. v. RKO General, Inc., 217 Cal. App. 2d 721, 32 Cal. Rptr. 73 (2d Dist. 1963).

Tex.—Butler v. Shelton, 408 S.W.2d 530 (Tex. Civ. App. Austin 1966), writ refused n.r.e., (Apr. 5, 1967).

[FN12] C.J.S., Gifts § 9.

[FN13] C.J.S., Mortgages § 17.

[FN14] C.J.S., Partnership § 6.

[FN15] C.J.S., Sales § 6.

[FN16] U.S.—In re Penn-Dixie Steel Corp., 6 B.R. 817 (Bankr. S.D. N.Y. 1980), decision aff'd, 10 B.R. 878 (S.D. N.Y. 1981).

[FN17] Ala.—First Nat. Bank of Mobile v. Pope, 274 Ala. 395, 149 So. 2d 781 (1963).

D.C.—Lucianna v. Hip Sing Ass'n, 256 A.2d 898 (D.C. 1969).

[FN18] N.J.—State by Van Riper v. Atlantic City Elec. Co., 23 N.J. 259, 128 A.2d 861 (1957).

N.Y.—People v. Lyon, 82 A.D.2d 516, 442 N.Y.S.2d 538 (2d Dep't 1981).

[FN19] Kan.—Matter of Estate of Sanders, 261 Kan. 176, 929 P.2d 153 (1996).

[FN20] Ohio—In re Guardianship of Lombardo, 86 Ohio St. 3d 600, 1999-Ohio-132,

716 N.E.2d 189 (1999).

Wyo.—Matter of Estate of Lohrie, 950 P.2d 1030 (Wyo. 1997).

[FN21] La.—Breaux v. Breaux, 218 La. 795, 51 So. 2d 73 (1950).

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§ 2. Trustee

West's Key Number Digest

West's Key Number Digest, Trusts ⚿1

The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another, but persons occupying confidential relationships which are not trusts in the technical sense are frequently denominated trustees in a broad and loose use of the term.

A trustee is a person who holds legal title to property under an express or implied agreement to apply it, and the income arising from it, to the benefit and use of another person.[FN1] In a trust relationship, the burdens belong to the trustee.[FN2] A trustee may also be defined as a person to whom property or funds have been committed in the belief or trust that the person will hold and apply them for the benefit of those who are entitled according to an expressed intention either by the parties themselves or by the deed, will, settlement, or arrangement of another.[FN3] A fiduciary acting in a representative capacity is a different person for juridical purposes from the same person acting in an individual capacity.[FN4]

In a broad sense, a trustee is defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.[FN5] Persons occupying confidential relationships, which are not trusts in the technical sense, are frequently denominated trustees in a broad and loose use of the term.[FN6]

The term "trustee" in its strict and technical sense is not properly applicable to a person occupying the position merely of an agent,[FN7] assignee,[FN8] bailee,[FN9] or custodian.[FN10] A "trustee" is also to be distinguished from a debtor,[FN11] factor,[FN12] or guardian.[FN13] Further, a distinction may be drawn between a "trustee" and a surviving partner.[FN14] While "nominee" and "trustee" have been held to be synonymous in meaning,[FN15] the terms have been distinguished.[FN16]

A trustee for bondholders has the characteristics of both depositary and ordinary trust-

ee.[FN17] A naked or dry trustee is one who is a trustee of a naked or dry trust.[FN18] A quasi-trustee is a person who reaps a benefit from a breach of trust and so becomes answerable as a trustee.[FN19]

A person may become a trustee by construction by intermeddling with, and assuming the management of trust property without authority, and such person is a "trustee de son tort."[FN20]

A trustee ex maleficio is a person who, being guilty of wrongful or fraudulent conduct, is held by equity to the duty and liability of a trustee, in relation to the subject matter, to prevent him or her from profiting from the wrong.[FN21]

[FN1] Okla.—State ex rel. Oklahoma Bar Ass'n v. Taylor, 2000 OK 35, 4 P.3d 1242 (Okla. 2000).

S.C.—Hamiter v. Retirement Div. of the South Carolina Budget and Control Bd., 326 S.C. 93, 484 S.E.2d 586 (1997).

Trustee has the legal interest in a trust

Ohio—Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 (2008).

Trustee by operation of law

The obligation of a trustee by operation of law is drawn from the status of trustee/ cestui que trust relation.

Okla.—Nichols v. Nichols, 2009 OK 43, 222 P.3d 1049 (Okla. 2009).

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Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

[FN2] Cal.—Moeller v. Superior Court, 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (1997).

[FN3] N.C.—Lichtenfels v. North Carolina Nat. Bank, 268 N.C. 467, 151 S.E.2d 78 (1966).

[FN4] Mo.—Barry v. Barry, 579 S.W.2d 136 (Mo. Ct. App. E.D. 1979).

N.Y.—In re McCabe's Estate, 176 Misc. 286, 27 N.Y.S.2d 127 (Sur. Ct. 1941).

[FN5] Wis.—In re Scheibe's Estate, 30 Wis. 2d 116, 140 N.W.2d 196 (1966).

[FN6] Del.—In re Goldstein, 46 Del. 450, 85 A.2d 361 (1951).

Okla.—Rees v. Briscoe, 1957 OK 174, 315 P.2d 758 (Okla. 1957).

[FN7] C.J.S., Agency § 23.

[FN8] C.J.S., Assignments § 4.

[FN9] C.J.S., Bailments § 8.

[FN10] U.S.—Jackson v. U S, 72 F.2d 764 (C.C.A. 3d Cir. 1934).

[FN11] Tex.—Guardian Trust Co. v. Studdert, 36 S.W.2d 578 (Tex. Civ. App. Beaumont 1931), writ granted, (July 22, 1931) and aff'd, 55 S.W.2d 550 (Tex. Comm'n App. 1932).

[FN12] C.J.S., Factors § 2.

[FN13] C.J.S., Guardian and Ward § 2.

[FN14] C.J.S., Partnership § 331.

[FN15] U.S.—Schuh Trading Co. v. Commissioner of Internal Revenue, 95 F.2d 404 (C.C.A. 7th Cir. 1938).

Cal.—Cisco v. Van Lew, 60 Cal. App. 2d 575, 141 P.2d 433 (4th Dist. 1943).

[FN16] U.S.—B F Avery & Sons Co v. Glenn, 16 F. Supp. 544 (W.D. Ky. 1936), judgment modified on other grounds, 106 F.2d 613 (C.C.A. 6th Cir. 1939).

[FN17] U.S.—Dunn v. Reading Trust Co., 121 F.2d 854 (C.C.A. 3d Cir. 1941).

[FN18] Ky.—Johnson v. Chavies Coal Co., 299 S.W.2d 629 (Ky. 1957).

[FN19] Kan.—Matter of Miller's Estate, 225 Kan. 655, 594 P.2d 167 (1979).

[FN20] U.S.—De Korwin v. First Nat. Bank of Chicago, 84 F. Supp. 918 (N.D. Ill. 1949), judgment aff'd in part, rev'd in part on other grounds, 179 F.2d 347 (7th Cir. 1949).

Ill.—Lawndale Nat. Bank of Chicago v. Kaspar American State Bank, 288 Ill. App. 555, 6 N.E.2d 670 (1st Dist. 1937).

[FN21] Mo.—Lucas v. Central Missouri Trust Co., 350 Mo. 593, 166 S.W.2d 1053 (1942).

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§ 3. Trustor, donor, creator, or founder

West's Key Number Digest

West's Key Number Digest, Trusts ⚷1

The person who establishes the trust is called the "donor," "creator," or "founder."

The person who establishes the trust is called the "donor," "creator," or "founder"[FN1] and is also sometimes called the "trustor"[FN2] or "settlor."[FN3] Under the Uniform Trust Code, "settlor" means a person, including a testator, who creates or contributes property to a trust.[FN4] The person who furnishes the consideration for the creation of a trust is the "settlor"[FN5] even though in form, the trust is created by another.[FN6]

While the settlor may be trustee or beneficiary of the trust, the settlor may not simultaneously be both sole trustee and sole beneficiary of the trust.[FN7]

[FN1] U.S.—Hopkins v. Commissioner of Internal Revenue, 144 F.2d 683, 29 Ohio Op. 347, 158 A.L.R. 1301 (C.C.A. 6th Cir. 1944).

Ohio—Ulmer v. Fulton, 129 Ohio St. 323, 2 Ohio Op. 326, 195 N.E. 557, 97 A.L.R. 1170 (1935).

[FN2] U.S.—Hopkins v. Commissioner of Internal Revenue, 144 F.2d 683, 29 Ohio Op. 347, 158 A.L.R. 1301 (C.C.A. 6th Cir. 1944).

Ohio—Ulmer v. Fulton, 129 Ohio St. 323, 2 Ohio Op. 326, 195 N.E. 557, 97 A.L.R. 1170 (1935).

[FN3] U.S.—Hopkins v. Commissioner of Internal Revenue, 144 F.2d 683, 29 Ohio Op. 347, 158 A.L.R. 1301 (C.C.A. 6th Cir. 1944).

N.Y.—Hanover Bank v. United Brethren's Church on Staten Island, 134 N.Y.S.2d 356 (Sup 1954).

[FN4] Unif. Trust Code § 103(15).

[FN5] Mich.—In re Hertsberg Inter Vivos Trust, 457 Mich. 430, 578 N.W.2d 289 (1998).

[FN6] Ill.—In re Estate of Hickey, 263 Ill. App. 3d 658, 200 Ill. Dec. 514, 635 N.E.2d 853 (1st Dist. 1994).

Mo.—Farrell v. Coulter, 898 S.W.2d 139 (Mo. Ct. App. E.D. 1995).

[FN7] Md.—In re Shank, 240 B.R. 216 (Bankr. D. Md. 1999).

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Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621.

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§ 4. Beneficiary

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

The term "beneficiary" is used to signify the beneficiary of an estate held in trust.

A trustee holds legal title to property for the benefit of the "beneficiary" or "cestui que trust."[FN1] The beneficiary has enjoyment of property of which the trustee has legal possession[FN2] or, as also stated, the beneficiary has the enjoyment of or ultimate right to the property whereof the trustee for the duration of the trust has the legal title.[FN3] The existence of a beneficiary is an indispensable element of an express trust, and in the absence of a beneficiary, the effort to create such trust aborts.[FN4] In a trust relationship, the benefits belong to the beneficiaries.[FN5]

Under the Uniform Trust Code, "beneficiary" means a person that has a present or future beneficial interest in a trust, vested or contingent, or in a capacity other than that of trustee, holds a power of appointment over trust property.[FN6]

[FN1] Okla.—State ex rel. Oklahoma Bar Ass'n v. Taylor, 2000 OK 35, 4 P.3d 1242 (Okla. 2000).

[FN2] N.Y.—Lenzner v. Falk, 68 N.Y.S.2d 699 (Sup 1947).

[FN3] Pa.—Schellentrager v. Tradesmens Nat. Bank & Trust Co., 370 Pa. 501, 88 A.2d 773 (1952).

[FN4] Tex.—Longoria v. Lasater, 292 S.W.3d 156 (Tex. App. San Antonio 2009), reh'g overruled, (May 1, 2009) and review denied, (Aug. 28, 2009).

[FN5] Cal.—Moeller v. Superior Court, 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947

P.2d 279 (1997).

[FN6] Unif. Trust Code § 103(3).

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§ 5. Trust estate or trust fund

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

The term "trust estate" is used in different senses and may mean the estate of the trustee or the estate of the beneficiary.

The terms "trust" and "trust estate" are merely convenient terms of description of a body of rights of parties interested in an aggregation of assets held by the trustee who has certain powers and duties with respect to them, including the legal although not beneficial title thereto.[FN1] The term "trust estate" is defined to be the property for which a trustee is responsible, the trust principal or, in other words, the trust corpus.[FN2]

A trust fund is the property held in a trust by a trustee.[FN3] A trust fund exists where the equitable title of the fund is in the owner and legal title in the trustee.[FN4] A trust fund is not an entity, and the parties in real interest are the owners respectively of the income and the remainder interests in the property.[FN5] The term trust property denotes the interests held in trust and includes such interests as may be the subject of present transfer by outright gift, devise, bequest, or sale.[FN6]

The "principal" of a trust is the corpus or main body of the trust as distinguished from income, whereas the "residue" is that which remains after a part is taken, separated, removed, or designated.[FN7]

A gift in trust is one that withholds the legal title from the donee although the equitable title passes.[FN8]

[FN1] N.Y.—In re Alderdice's Will, 71 N.Y.S.2d 84 (Sup 1947), judgment rev'd on other grounds, 273 A.D. 62, 75 N.Y.S.2d 313 (1st Dep't 1947), judgment aff'd, 297

N.Y. 996, 80 N.E.2d 455 (1948).

[FN2] Black's Law Dictionary (8th ed.).

[FN3] Black's Law Dictionary (8th ed.).

[FN4] Tex.—Hidalgo County Bank & Trust Co. v. Goodwin, 137 S.W.2d 161 (Tex. Civ. App. San Antonio 1940), writ dismissed, judgment correct.

[FN5] N.Y.—In re Alderdice's Will, 71 N.Y.S.2d 84 (Sup 1947), judgment rev'd on other grounds, 273 A.D. 62, 75 N.Y.S.2d 313 (1st Dep't 1947), judgment aff'd, 297 N.Y. 996, 80 N.E.2d 455 (1948).

[FN6] Cal.—Gonsalves v. Hodgson, 38 Cal. 2d 91, 237 P.2d 656 (1951).

[FN7] Cal.—Security-First Nat. Bank of Los Angeles v. Wellslager, 88 Cal. App. 2d 210, 198 P.2d 700 (2d Dist. 1948).

[FN8] Me.—Cazallis v. Ingraham, 119 Me. 240, 110 A. 359 (1920).

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§ 6. Nature, elements, and purpose of trusts

West's Key Number Digest

West's Key Number Digest, Trusts ⚷1

In its simplest elements, a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the beneficiary, with respect to property held by the former for the benefit of the latter, and it is fundamentally essential to the existence of any trust that there be a trust res or subject matter and that there be a separation of the legal estate from the beneficial enjoyment.

In its simplest elements, in creating a trust, a settlor deposits funds in trust to a trustee for the benefit of a third party, the beneficiary.[FN1] Under this view, in order for a trust to exist, there must be a trustee, some property held in trust, and beneficiary for whom the property is held.[FN2] The term implies the separate coexistence of two estates or interests, one equitable and one legal.[FN3]

Although a trust is not considered a contractual relation,[FN4] it may arise out of a contract.[FN5] So a trust relation may arise by agreement or intention or, without either, the circumstances may be such that a trust will arise by implication or operation of law.[FN6] Equity cannot create a trust where the parties did not intend to do so, and where none arose by operation of law.[FN7]

The legal and equitable obligations of a fiduciary result from the real nature of the relationship between the parties and not merely from the literal wording of their contract.[FN8] Trusts are always imperative and are obligatory on the conscience of the person intrusted.[FN9] Since the primary object of a trust is to confine the powers of the beneficiary and to deprive him or her of any power to dispose of and manage the trust,[FN10] it has been the policy of the courts vigorously to protect trust estates and to resist any attempts to defeat the will of a testator or to allow improvident beneficiaries to obtain their estates outright.[FN11] A trust is usually created to preserve property intact and to earn income for the benefi-

ciary.[FN12]

A trust is not a person but rather a fiduciary relationship with respect to property.[FN13] Unlike a corporation,[FN14] a trust is not a legal entity.[FN15] Rather, a trust is no being at all.[FN16] Thus, an ordinary express trust is not an entity separate from its trustees.[FN17]

[FN1] N.C.—Goldston v. State, 683 S.E.2d 237 (N.C. Ct. App. 2009), appeal dismissed, review denied, 363 N.C. 802, 690 S.E.2d 536 (2010).

As to elements and essentials of express trusts, see §§ 16 to 26.

As to nature of:

Constructive trusts, generally, see § 176.

Resulting trusts, see § 122.

[FN2] U.S.—In re Cannon, 277 F.3d 838, 2002 FED App. 0026P (6th Cir. 2002) (under Tennessee law); In re Williams, 290 B.R. 83 (Bankr. E.D. Pa. 2003) (under Pennsylvania law); In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009).

[FN3] U.S.—United Pacific Ins. Co. v. First Nat. Bank of Or., 206 F. Supp. 94 (D. Or. 1962).

Mo.—McDaniel Title Co. v. Lemons, 626 S.W.2d 686 (Mo. Ct. App. W.D. 1981).

[FN4] U.S.—Graham v. Texas Gulf Sulphur Co., 457 F.2d 418 (5th Cir. 1972).

[FN5] U.S.—Christiansen v. National Sav. and Trust Co., 683 F.2d 520 (D.C. Cir. 1982).

Wis.—In re Cudahy's Trust, 22 Wis. 2d 198, 125 N.W.2d 344 (1963).

[FN6] U.S.—In re Chicago Exp., Inc., 222 F. Supp. 566 (S.D. N.Y. 1963), judgment aff'd, 332 F.2d 276 (2d Cir. 1964).

Cal.—Askew v. Resource Funding, Ltd., 94 Cal. App. 3d 402, 156 Cal. Rptr. 208 (2d Dist. 1979).

[FN7] Mo.—Milgram v. Jiffy Equipment Co., 362 Mo. 1194, 247 S.W.2d 668, 30 A.L.R.2d 925 (1952).

Okla.—McFarling v. Demco, Inc., 1976 OK 15, 546 P.2d 625 (Okla. 1976).

[FN8] U.S.—In re Davis, 13 B.R. 456 (Bankr. S.D. Ohio 1980).

[FN9] N.C.—Henderson v. Western Carolina Power Co., 200 N.C. 443, 157 S.E. 425,

80 A.L.R. 497 (1931).

[FN10] Ill.—Kilgore, for Use of John Deere Plow Co., v. State Bank of Colusa, 300 Ill. App. 409, 21 N.E.2d 9 (3d Dist. 1939), judgment aff'd, 372 Ill. 578, 25 N.E.2d 39 (1939).

Wash.—State ex rel. Wirt v. Superior Court for Spokane County, 10 Wash. 2d 362, 116 P.2d 752 (1941).

[FN11] N.Y.—In re Lensman's Will, 137 Misc. 77, 243 N.Y.S. 126 (Sur. Ct. 1930).

[FN12] Cal.—Day v. First Trust & Savings Bank of Pasadena, 47 Cal. App. 2d 470, 118 P.2d 51 (2d Dist. 1941).

Ky.—People's State Bank & Trust Co. v. Wade, 269 Ky. 89, 106 S.W.2d 74 (1937).

[FN13] Cal.—In re Marriage of Lund, 174 Cal. App. 4th 40, 94 Cal. Rptr. 3d 84 (4th Dist. 2009).

[FN14] Cal.—Stoltenberg v. Newman, 179 Cal. App. 4th 287, 101 Cal. Rptr. 3d 606 (2d Dist. 2009), review denied, (Feb. 3, 2010).

[FN15] Cal.—Stoltenberg v. Newman, 179 Cal. App. 4th 287, 101 Cal. Rptr. 3d 606 (2d Dist. 2009), review denied, (Feb. 3, 2010).

Tex.—Ditta v. Conte, 298 S.W.3d 187 (Tex. 2009).

[FN16] Idaho—Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457, 69 U.C.C. Rep. Serv. 2d 890 (2009), cert. denied, 130 S. Ct. 1512, 176 L. Ed. 2d 121 (2010).

[FN17] Cal.—Presta v. Tepper, 179 Cal. App. 4th 909, 102 Cal. Rptr. 3d 12 (4th Dist. 2009).

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§ 7. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

Trusts, with respect to the manner of their creation, are divided primarily into two classes, express and implied.

Trusts with respect to the manner of their creation are divided primarily into two classes, express and implied,[FN1] or, as it is sometimes stated, trusts are either express or they arise by operation of law.[FN2] Hence, express trusts depend upon intention, while implied trusts arise by operation of the law.[FN3] Express trusts are further classified into active, alive, or operative trusts and passive, simple, nominal, or dry trusts.[FN4]

[FN1] U.S.—American Nat. Bank of St. Paul v. National Indem. Co. of Omaha, 222 F.2d 513 (8th Cir. 1955).

Fla.—Hiestand v. Geier, 396 So. 2d 744 (Fla. Dist. Ct. App. 3d Dist. 1981).

S.D.—Knock v. Knock, 80 S.D. 159, 120 N.W.2d 572 (1963).

As to classes of trustees, see § 2.

As to express trusts, see § 8.

As to implied trusts, see § 9.

Other classifications

Iowa—Matter of Young's Estate, 273 N.W.2d 388 (Iowa 1978).

[FN2] Ala.—Smith v. Davis, 352 So. 2d 451 (Ala. Civ. App. 1977).

Md.—Klein v. Bryer, 227 Md. 473, 177 A.2d 412, 3 A.L.R.3d 1411 (1962).

[FN3] Mont.—Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 (1997).

[FN4] Me.—Dixon v. Dixon, 123 Me. 470, 124 A. 198 (1924).

As to active or operative trusts defined, see § 12.

As to passive trusts defined, see § 12.

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§ 8. Express trusts

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will, or by words either expressly or impliedly evincing an intention to create a trust.

Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will,[FN1] or by words either expressly or impliedly evincing an intention to create a trust.[FN2] Establishing the existence of an express trust requires proof of three elements: (1) a trustee who holds trust property and who is subject to the equitable duties to deal with it for the benefit of another person, (2) a beneficiary to whom the trustee owes the equitable duties to deal with the trust property for his or her benefit, and (3) identifiable trust property.[FN3]

The scope of a "technical trust" or "express trust" is not restricted to trusts that arise by virtue of a formal trust agreement, but includes relationships in which trust-type obligations are imposed pursuant to statute or common law.[FN4]

[FN1] U.S.—Leggett's Estate v. U. S., 418 F.2d 1257 (3d Cir. 1969).

Ill.—Samuel v. Northern Trust Co., 34 Ill. App. 3d 500, 340 N.E.2d 162 (1st Dist. 1975).

N.C.—Bingham v. Lee, 266 N.C. 173, 146 S.E.2d 19 (1966).

As to testamentary trusts, see C.J.S., Wills §§ 1425 to 1513.

Similar definition

Ill.—Sears v. First Federal Sav. & Loan Ass'n of Chicago, 1 Ill. App. 3d 621, 275 N.E.2d 300, 50 A.L.R.3d 683 (1st Dist. 1971).

[FN2] U.S.—In re Cairone, 12 B.R. 60 (Bankr. D. R.I. 1981).

R.I.—Concannon v. Concannon, 116 R.I. 323, 356 A.2d 487 (1976).

Va.—Leonard v. Counts, 221 Va. 582, 272 S.E.2d 190 (1980).

[FN3] U.S.—In re Cannon, 277 F.3d 838, 2002 FED App. 0026P (6th Cir. 2002) (under Tennessee law).

[FN4] U.S.—In re Hartman, 254 B.R. 669 (Bankr. E.D. Pa. 2000).

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§ 9. Implied trusts

West's Key Number Digest

West's Key Number Digest, Trusts 62, 91

Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced on the transaction by operation of law as matters of equity, independently of the particular intention of the parties.

Implied trusts are usually defined as those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced on the transaction by operation of law as matters of equity, independently of the particular intention of the parties.[FN1] However, some definitions disregard the element of intent and define these trusts to be such only as arise by operation of law.[FN2]

"Trusts by operation of law" and "involuntary trusts" are all synonymous with "implied trusts."[FN3] This type of trust is regarded as a creature of equity.[FN4]

As ordinarily classified and defined, implied trusts are subdivided into the two classes, resulting and constructive,[FN5] but by some authorities, the term "implied trust" is used in a sense exclusive of these two classes.[FN6]

[FN1] Ill.—Williams v. Teachers Ins. and Annuity Ass'n, 15 Ill. App. 3d 542, 304 N.E.2d 656 (1st Dist. 1973).

Iowa—Grand Lodge of Iowa of Independent Order of Odd Fellows v. Osceola Lodge No. 18, Independent Order of Odd Fellows, 178 N.W.2d 362 (Iowa 1970).

Okla.—Matter of Burns' Estate, 1978 OK CIV APP 42, 585 P.2d 1126 (Ct. App. Div. 2 1978).

As to subdivision of implied trusts into constructive trusts and resulting trusts, see § 7.

[FN2] Or.—Shipe v. Hillman, 206 Or. 556, 292 P.2d 123 (1955).

Wis.—Joerres v. Koscielniak, 13 Wis. 2d 242, 108 N.W.2d 569 (1961).

[FN3] Ill.—Murray v. Behrendt, 399 Ill. 22, 76 N.E.2d 431 (1947).

[FN4] Iowa—Matter of Young's Estate, 273 N.W.2d 388 (Iowa 1978).

Wyo.—Kane v. Kane, 577 P.2d 172 (Wyo. 1978).

[FN5] Mont.—Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 (1997).

Or.—Connall v. Felton, 225 Or. App. 266, 201 P.3d 219 (2009), review denied, 346 Or. 257, 210 P.3d 905 (2009).

[FN6] Kan.—Allbert v. Allbert, 148 Kan. 527, 83 P.2d 795 (1938).

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§ 10. Resulting trusts

West's Key Number Digest

West's Key Number Digest, Trusts 62, 63.9

A resulting trust is broadly defined as a trust which is raised or created by the act or construction of law, but in its more restricted sense it, is a trust raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance.

Although the term "resulting trust" has been broadly defined as a trust which is raised or created by the act or construction of law,[FN1] a resulting trust arises from the nature of circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and although there is an absence of fraud or constructive fraud.[FN2] Thus, a resulting trust may be imposed when parties' actions or expressions indicate that they intended to create a trust relationship.[FN3] The creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction.[FN4] A resulting trust generally arises in one of three situations: where there is a failure of an express trust, where the performance of a trust does not exhaust the trust estate, and where property is purchased and the purchase price is paid by one who directs that the vendor convey the property to another person.[FN5] Such trusts are also called "presumptive" trusts and are frequently defined in terms of, or in connection with, the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another,[FN6] although they may result from other kinds of transactions.[FN7] In the case of a resulting trust, it is not necessary to show that the settlor manifested any intention to create a trust, though it is necessary to show the absence of any intention to give the beneficial interest to the transferee.[FN8]

A resulting trust does not arise from or depend on any agreement between the parties.[FN9] A resulting trust will not be sustained where the transaction can be construed in any other reasonable fashion.[FN10]

A resulting trust differs from an express trust in the manner of its creation.[FN11] A resulting trust arises where property is transferred under circumstances that raise an inference that the person who makes the transfer or causes it to be made did not intend the transferee to take the beneficial interest in the property.[FN12]

A resulting trust arises at the time of the conveyance.[FN13] Thus, a resulting trust comes into being at the instant title vests or not at all.[FN14] A resulting trust is created from what the parties do and never from what they agree to do, and it must arise, if at all, at the instant the deed is taken and cannot be created by subsequent occurrences.[FN15]

Constructive trusts distinguished.

Resulting and constructive trusts, while frequently confused, are clearly distinguishable.[FN16] A resulting trust is a status that automatically arises by operation of law out of certain circumstances, while a constructive trust is a remedy that equity applies in order to prevent injustice or in order to do justice.[FN17] A resulting trust involves a presumption or supposition of law of an intention to create a trust, whereas a constructive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee.[FN18]

[FN1] Ill.—In re Wilson's Estate, 81 Ill. 2d 349, 43 Ill. Dec. 23, 410 N.E.2d 23 (1980).

N.Y.—Julien J. Studley, Inc. v. Lefrak, 66 A.D.2d 208, 412 N.Y.S.2d 901 (2d Dep't 1979), judgment aff'd, 48 N.Y.2d 954, 425 N.Y.S.2d 65, 401 N.E.2d 187 (1979).

Okla.—Cacy v. Cacy, 1980 OK 138, 619 P.2d 200 (Okla. 1980).

[FN2] Tenn.—Estate of Queener v. Helton, 119 S.W.3d 682 (Tenn. Ct. App. 2003).

Duties of trustee

The trustee of a resulting trust has no duties to perform, no trust to administer, and no purpose to carry out except the single task of holding onto or conveying the property to the beneficiary.

Cal.—Fidelity Nat. Title Ins. Co. v. Schroeder, 179 Cal. App. 4th 834, 101 Cal. Rptr. 3d 854 (5th Dist. 2009).

[FN3] Nev.—Waldman v. Maini, 195 P.3d 850 (Nev. 2008).

[FN4] N.C.—Carcano v. JBSS, LLC, 684 S.E.2d 41 (N.C. Ct. App. 2009).

[FN5] U.S.—In re Daugherty, 261 B.R. 735 (Bankr. M.D. Fla. 2000) (under Florida

law).

Ohio—Brate v. Hurt, 174 Ohio App. 3d 101, 2007-Ohio-6571, 880 N.E.2d 980 (12th Dist. Warren County 2007).

[FN6] Neb.—Holbein v. Holbein, 149 Neb. 281, 30 N.W.2d 899 (1948).

Wash.—Mouser v. O'Sullivan, 22 Wash. 2d 543, 156 P.2d 655 (1945).

[FN7] § 122.

[FN8] N.M.—Aragon v. Rio Costilla Co-op. Livestock Ass'n, 112 N.M. 152, 812 P.2d 1300 (1991).

[FN9] N.C.—Cury v. Mitchell, 688 S.E.2d 825 (N.C. Ct. App. 2010).

[FN10] Ill.—Judgment Services Corp. v. Sullivan, 321 Ill. App. 3d 151, 254 Ill. Dec. 70, 746 N.E.2d 827 (1st Dist. 2001).

[FN11] N.M.—Aragon v. Rio Costilla Co-op. Livestock Ass'n, 112 N.M. 152, 812 P.2d 1300 (1991).

[FN12] Cal.—Fidelity Nat. Title Ins. Co. v. Schroeder, 179 Cal. App. 4th 834, 101 Cal. Rptr. 3d 854 (5th Dist. 2009).

Mo.—Lynch v. Lynch, 260 S.W.3d 834 (Mo. 2008), as modified on denial of reh'g, (Aug. 26, 2008).

Ohio—Stevens v. Radey, 117 Ohio St. 3d 65, 2008-Ohio-291, 881 N.E.2d 855 (2008).

[FN13] Ala.—McClellan v. Pennington, 895 So. 2d 892 (Ala. 2004).

Ill.—In re Marriage of Kendra, 351 Ill.App.3d 826, 815 N.E.2d 22 (Ill.App.3.Dist. 2004).

[FN14] U.S.—Hong Kong Electro-Chemical Works, Ltd. v. Less, 539 F.3d 795 (7th Cir. 2008) (under Illinois law).

[FN15] Mo.—Leonard v. Leonard, 112 S.W.3d 30 (Mo. Ct. App. W.D. 2003).

[FN16] U.S.—Doing v. Riley, 176 F.2d 449 (5th Cir. 1949).

Tex.—Sohio Petroleum Co. v. Jurek, 248 S.W.2d 294 (Tex. Civ. App. Fort Worth 1952), writ refused n.r.e., (July 16, 1952).

[FN17] Fla.—Palmland Villas I Condominium Ass'n, Inc. v. Taylor, 390 So. 2d 123 (Fla. Dist. Ct. App. 4th Dist. 1980) (rejected on other grounds by, In re General Coffee Corp., 828 F.2d 699, 96 A.L.R. Fed. 85 (11th Cir. 1987)).

Ill.—Price v. State, 79 Ill. App. 3d 143, 34 Ill. Dec. 690, 398 N.E.2d 365 (1st Dist.

1979).

[FN18] N.C.—Carcano v. JBSS, LLC, 684 S.E.2d 41 (N.C. Ct. App. 2009).

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§ 11. Constructive trusts

West's Key Number Digest

West's Key Number Digest, Trusts ⚷91

A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.

A "constructive trust" is an equitable remedy[FN1] that is designed to prevent unjust enrichment.[FN2] A constructive trust arises by operation of law against one who, through any form of unconscionable conduct, holds legal title to property where equity and good conscience demand that the person should not.[FN3] Stated another way, a constructive trust is a duty or relationship imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty, or some other circumstance making it inequitable for such person to retain it against the claim of the beneficiary of the constructive trust.[FN4] It is also broadly defined as a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust.[FN5] A constructive trust, except to the extent it may arise out of an express trust or the attempt to create one, is not imposed to effectuate the intention of the parties but is imposed to prevent the unjust enrichment that would result if the person having the property were permitted to retain it.[FN6] A constructive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee.[FN7] As otherwise expressed, a constructive trust is constructed by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, bad faith, undue influence, abuse of confidence, or mistake in the transaction that originates the problem.[FN8] While fraud is a prerequisite to the imposition of a "constructive trust," this prerequisite is not confined to fraud as one might define it for purposes of criminal law, rather, the remedy is available where there is standard fraud or a breach of duty arising out of a confidential or fiduciary relationship.[FN9]

Constructive trusts are also called trusts ex maleficio and trusts ex delicto.[FN10] In still other instances, they have been called trusts in invitum or involuntary trusts.[FN11] A constructive trust is not a "trust" strictly speaking, but equity imposes a trust relation because morality, justice, conscience, and fair dealing demand that the relation be established.[FN12]

CUMULATIVE SUPPLEMENT

Cases:

Under Illinois law, a constructive trust is a restitutionary remedy which arises by operation of law, and is imposed by a court in situations where a person holding money or property would profit by a wrong or be unjustly enriched at the expense of another if he were permitted to retain it. Dexia Credit Local v. Rogan, 629 F.3d 612 (7th Cir. 2010).

Constructive trust is a form of remedy that is flexibly fashioned in equity to provide relief where a balancing of interests in the context of a particular case seems to call for it. F.T.C. v. Network Services Depot, Inc., 617 F.3d 1127 (9th Cir. 2010).

An American court may grant equitable relief in the form of a constructive trust over assets located in a foreign country. Estate of Hoch v. Stifel, 2011 ME 24, 16 A.3d 137 (Me. 2011).

A constructive trust implied by law as a result of mistake, violation of a fiduciary duty, or unjust enrichment, may be imposed, generally as between transferor and transferee, without proof of fraudulent intent. Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011).

By imposing a constructive trust, a court orders a person who owns the legal title to property to hold or use the property for the benefit of another or to convey the property to another to avoid unjust enrichment. Bishop v. Bishop, 188 Ohio App. 3d 98, 2010-Ohio-2958, 934 N.E.2d 420 (4th Dist. Jackson County 2010).

[END OF SUPPLEMENT]

[FN1] Alaska—Young v. Lowery, 221 P.3d 1006 (Alaska 2009).

Pa.—Williams Tp. Bd. of Supervisors v. Williams Tp. Emergency Co., Inc., 986 A.2d 914 (Pa. Commw. Ct. 2009).

Tex.—Garcia v. Garza, 2010 WL 374405 (Tex. App. San Antonio 2010), review denied, (Apr. 30, 2010).

A form of relief, not an independent cause of action

Ind.—Leever v. Leever, 919 N.E.2d 118 (Ind. Ct. App. 2009).

Tex.—Beverly Foundation v. W.W. Lynch, 301 S.W.3d 734 (Tex. App. Amarillo 2009), reh'g overruled, (Jan. 11, 2010).

[FN2] Pa.—Williams Tp. Bd. of Supervisors v. Williams Tp. Emergency Co., Inc., 986 A.2d 914 (Pa. Commw. Ct. 2009).

Tex.—Garcia v. Garza, 2010 WL 374405 (Tex. App. San Antonio 2010), review denied, (Apr. 30, 2010).

Wis.—Pluemer ex rel. Buggs v. Pluemer, 322 Wis. 2d 138, 2009 WI App 170, 776 N.W.2d 261 (Ct. App. 2009).

[FN3] Ohio—Colley v. Colley, 2009-Ohio-6776, 2009 WL 4936382 (Ohio Ct. App. 10th Dist. Franklin County 2009).

[FN4] N.C.—Cury v. Mitchell, 688 S.E.2d 825 (N.C. Ct. App. 2010).

[FN5] Kan.—Grubb v. Grubb, 208 Kan. 484, 493 P.2d 189 (1972).

N.D.—Kutchera v. Kutchera, 189 N.W.2d 680 (N.D. 1971).

[FN6] N.M.—Aragon v. Rio Costilla Co-op. Livestock Ass'n, 112 N.M. 152, 812 P.2d 1300 (1991).

Tex.—Robbins v. Payne, 55 S.W.3d 740 (Tex. App. Amarillo 2001).

[FN7] N.C.—Carcano v. JBSS, LLC, 684 S.E.2d 41 (N.C. Ct. App. 2009).

[FN8] Fla.—Foundation for Developmentally Disabled, Inc. v. Step By Step Early Childhood Educ. and Therapy Center, Inc., 29 So. 3d 1221 (Fla. Dist. Ct. App. 2d Dist. 2010).

S.C.—McDaniel v. Kendrick, 386 S.C. 437, 688 S.E.2d 852 (Ct. App. 2009).

Fraud as common element

N.C.—Cury v. Mitchell, 688 S.E.2d 825 (N.C. Ct. App. 2010).

Ordinarily arises out of fraud

A constructive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title.

N.C.—Carcano v. JBSS, LLC, 684 S.E.2d 41 (N.C. Ct. App. 2009).

Not limited to fraud or improper means

Under Virginia law, constructive trusts are created not only when property has been acquired by fraud or improper means but also when it has been fairly and properly acquired, but it is contrary to principles of equity that it should be retained, at least for the acquirer's own benefit.

U.S.—In re Mepco, Inc., 276 B.R. 94 (Bankr. W.D. Va. 2001).

[FN9] Ind.—Leever v. Leever, 919 N.E.2d 118 (Ind. Ct. App. 2009).

[FN10] Ala.—Knowles v. Canant, 255 Ala. 331, 51 So. 2d 355 (1951).

[FN11] Mo.—Lucas v. Central Missouri Trust Co., 350 Mo. 593, 166 S.W.2d 1053 (1942).

[FN12] N.C.—Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83 (1938).

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§ 12. Simple and special, passive and active, technical and operative trusts

West's Key Number Digest

West's Key Number Digest, Trusts 🔑135, 136

A passive trust is one in which the trustee is a mere passive depositary of the property, while an active trust is one in which either from the express directions of the language creating the trust, or from the very nature of the trust itself, the trustee is charged with the performance of active duties with respect to the trust property.

Trusts are also classified as "simple" and "special"[FN1] or "passive" and "active."[FN2] A simple, passive, dry, or naked trust is one in which the trustee is a mere passive depositary of the property, with no active duties to perform.[FN3] On the other hand, special or active trusts are those in which either from the express directions of the language creating the trust or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the beneficiaries.[FN4] As disclosed by the above definitions, these classes of trusts are in theory clearly distinguishable.[FN5]

An express active trust is one in which, from the express directions of the language creating the trust or from the very nature of the trust itself, the trustee is charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the beneficiary.[FN6]

[FN1] N.J.—Palisades Trust & Guaranty Co. v. Probst, 128 N.J. Eq. 332, 16 A.2d 271 (Ch. 1940).

[FN2] Mo.—Penney v. White, 594 S.W.2d 632 (Mo. Ct. App. W.D. 1980).

Wis.—Grant County Service Bureau, Inc. v. Treweek, 19 Wis. 2d 548, 120 N.W.2d

634 (1963).

[FN3] Ill.—Price v. State, 79 Ill. App. 3d 143, 34 Ill. Dec. 690, 398 N.E.2d 365 (1st Dist. 1979).

Mo.—Penney v. White, 594 S.W.2d 632 (Mo. Ct. App. W.D. 1980).

S.C.—Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 A.L.R.3d 918 (1975).

[FN4] Ill.—Price v. State, 79 Ill. App. 3d 143, 34 Ill. Dec. 690, 398 N.E.2d 365 (1st Dist. 1979).

Or.—Lee v. Melone, 19 Or. App. 301, 527 P.2d 414 (1974).

[FN5] N.J.—Skovborg v. Smith, 8 N.J. Super. 424, 72 A.2d 911 (Ch. Div. 1950).

[FN6] U.S.—Village of Brookfield v. Pentis, 101 F.2d 516 (C.C.A. 7th Cir. 1939).

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§ 13. Voluntary and involuntary trusts

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

A voluntary trust is usually one which is created by express agreement, while an involuntary trust is one which is imposed independently of or in absence of such an agreement.

In some states, trusts are divided into voluntary and involuntary trusts.[FN1] A voluntary trust is usually one which is created by express agreement, while an involuntary trust is one which is imposed independently of or in absence of such an agreement.[FN2]

Involuntary trusts are either resulting or constructive trusts.[FN3] An involuntary trust, as distinguished from a voluntary trust, is one where the intention of the parties is not expressed and such intention is therefore implied by law (resulting trust) or is one which is imposed by law regardless of intention (constructive trust).[FN4]

A complete voluntary trust is one which has been completely created, that is, the subject matter has been designated, the trustee and beneficiary have been named, and the limitations and trusts are fully and perfectly declared.[FN5]

[FN1] Mont.—Platts v. Platts, 134 Mont. 474, 334 P.2d 722 (1959).

[FN2] Cal.—Wells Fargo Bank Am. Trust Co. v. Greuner, 226 Cal. App. 2d 454, 38 Cal. Rptr. 132 (1st Dist. 1964).

As to voluntary trust distinguished from gift inter vivos, see C.J.S., Gifts § 9.

[FN3] Mont.—Lewis v. Bowman, 113 Mont. 68, 121 P.2d 162 (1942) (overruled in part on other grounds by, Cook v. Cook, 159 Mont. 98, 495 P.2d 591 (1972)).

[FN4] Cal.—Wells Fargo Bank Am. Trust Co. v. Greuner, 226 Cal. App. 2d 454, 38 Cal. Rptr. 132 (1st Dist. 1964).

[FN5] U.S.—Newman v. C.I.R., 222 F.2d 131 (9th Cir. 1955).

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§ 14. Charitable and private trusts

West's Key Number Digest

West's Key Number Digest, Trusts 1

Trusts are classified as charitable and private, and under such classification, a private trust is one wherein property is devoted to use of designated persons, while a charitable trust has as a beneficiary a definite class and indefinite beneficiaries within the definite class and has a beneficial purpose.

A charitable trust means a trust or portion of a trust created for a charitable purpose.[FN1] A private trust is one where the beneficial interest is vested absolutely in one or more individuals, who are or may be within a certain time distinctly ascertained.[FN2] The fundamental distinction between private trusts and charitable trusts is that in a private trust, property is devoted to use of specified persons who are designated as beneficiaries of the trust, while a charitable trust has as a beneficiary a definite class and indefinite beneficiaries within the definite class and has a purpose which is beneficial to a community.[FN3]

[FN1] Unif. Trust Code § 103(4).

[FN2] Md.—Rosser v. Prem, 52 Md. App. 367, 449 A.2d 461, 34 A.L.R.4th 403 (1982).

Tex.—Rice v. Morris, 541 S.W.2d 627 (Tex. Civ. App. Corpus Christi 1976), writ dismissed by agreement, (Nov. 2, 1977).

[FN3] Utah—Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998).

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§ 15. Other kinds and classes of trusts

West's Key Number Digest

West's Key Number Digest, Trusts ⚷1, 28

The courts have defined many terms descriptive of kinds and classes of trusts other than those already considered; a parol trust is a right to property created without writing by one person for the benefit of another, and a spendthrift trust is a trust created to provide a fund for the maintenance of the beneficiary, and at the same time to secure it against his or her improvidence or incapacity.

The courts have defined many terms descriptive of kinds and classes of trusts other than those already considered.[FN1] Trusts defined and discussed elsewhere are "Massachusetts trusts,"[FN2] savings bank trusts,[FN3] testamentary trusts,[FN4] voting trusts,[FN5] and constructive trusts.[FN6]

Provision of a fixed amount of income regardless of the amount of principal is a distinguishing feature of an "annuity trust," while in a "common trust," the amount of the principal is fixed regardless of the income as long as the income is reasonable.[FN7]

An express trust may depend for its operation on a future event and is then a contingent trust.[FN8] On the other hand, a directory trust is a trust that is not completely and finally settled by the instrument creating it, but only defined in its general purpose and to be carried into detail according to later specific directions.[FN9] A "donative trust" is a trust not requiring payment of any consideration by the beneficiary.[FN10] Such a trust may be created by transfer of property in trust as a gift for the benefit of another person or by proper declaration of the legal owner of property that he or she will hold it in trust for another's benefit.[FN11] Where such a trust is created, the law of trusts is superimposed on the law of gifts or the law of wills.[FN12]

A parol trust is a right to property created without writing by one person for the benefit of another.[FN13] Resulting trusts are also known as parol trusts.[FN14]

A precatory trust is a trust created by certain words which are more like words of entreaty and permission than of command or certainty.[FN15]

A "declaratory trust" occurs when a settlor declares himself or herself as trustee of property for the benefit of another, the beneficiary.[FN16]

A "spendthrift trust" is a trust in which the power of alienation has been suspended[FN17] and which can only be created by an express restraint on alienation.[FN18] It is a trust created for the maintenance or benefit of a beneficiary which is secured against his or her improvidence, placing it beyond the reach of his or her creditors.[FN19] For example, a trust which provides that the trustee would distribute the property outright to the beneficiary unless the beneficiary were insolvent, had filed a petition of bankruptcy, or would not personally enjoy the property, and which made the trust discretionary in those situations, with the beneficiary entitled to outright distribution of the trust when all those conditions ceased to exist, is a "spendthrift trust."[FN20]

[FN1] U.S.—Carey v. U.S. Industries, Inc., 414 F. Supp. 794 (N.D. Ill. 1976).

"Nominee trust"

Mass.—F.D.I.C. v. Porter, 46 Mass. App. Ct. 241, 704 N.E.2d 1203 (1999).

Revocable inter vivos trust

Wyo.—Matter of Estate of Lohrie, 950 P.2d 1030 (Wyo. 1997).

Discretionary trust

Ohio—Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 (2008).

Statutory trust

Okla.—Nichols v. Nichols, 2009 OK 43, 222 P.3d 1049 (Okla. 2009).

[FN2] C.J.S., Business Trusts § 1.

[FN3] § 55.

[FN4] C.J.S., Wills §§ 1425 to 1513.

[FN5] C.J.S., Corporations §§ 467 to 471.

[FN6] § 11.

[FN7] N.Y.—In re McQueen's Will, 65 N.Y.S.2d 201 (Sur. Ct. 1946).

[FN8] Black's Law Dictionary (8th ed.).

[FN9] Black's Law Dictionary (8th ed.).

[FN10] Tex.—Elbert v. Waples-Platter Co., 156 S.W.2d 146 (Tex. Civ. App. Fort Worth 1941), writ refused w.o.m., (Jan. 14, 1942).

[FN11] Tex.—Elbert v. Waples-Platter Co., 156 S.W.2d 146 (Tex. Civ. App. Fort Worth 1941), writ refused w.o.m., (Jan. 14, 1942).

[FN12] Tex.—Elbert v. Waples-Platter Co., 156 S.W.2d 146 (Tex. Civ. App. Fort Worth 1941), writ refused w.o.m., (Jan. 14, 1942).

[FN13] Ky.—Moore v. Shifflett, 187 Ky. 7, 216 S.W. 614 (1920).

[FN14] N.C.—Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938).

[FN15] Mo.—Simpson v. Corder, 185 Mo. App. 398, 170 S.W. 357 (1914).

[FN16] Ala.—Coosa River Water, Sewer and Fire Protection Authority v. SouthTrust Bank of Alabama, N.A., 611 So. 2d 1058 (Ala. 1993).

[FN17] Minn.—Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998).

[FN18] Ark.—Sanders v. Putman, 315 Ark. 251, 866 S.W.2d 827 (1993).

[FN19] Va.—Jackson v. Fidelity and Deposit Co. of Maryland, 269 Va. 303, 608 S.E.2d 901 (2005).

[FN20] Ohio—Scott v. Bank One Trust Co., N.A., 62 Ohio St. 3d 39, 577 N.E.2d 1077 (1991).

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A.L.R. Index, Constructive Trusts

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§ 16. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

Trusts are created by one's voluntary act and by operation of law.

A trust may be created by either a declaration of trust or by transfer of property.[FN1] An express trust is created when a grantor or trustor divests herself or himself of full legal and equitable ownership in property with a manifestation of intent to create legal title in a trustee and equitable ownership in a beneficiary.[FN2]

The Uniform Trust Code provides that a trust may be created by: (1) a transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death, (2) a declaration by the owner of property that the owner holds identifiable property as trustee, or (3) an exercise of a power of appointment in favor of a trustee.[FN3]

CUMULATIVE SUPPLEMENT

Cases:

Under California law, equitable ownership in a trust is sufficient to meet the ownership requirement for purposes of alter ego liability. In re Schwarzkopf, 626 F.3d 1032 (9th Cir. 2010).

[END OF SUPPLEMENT]

[FN1] Okla.—Nichols v. Nichols, 2009 OK 43, 222 P.3d 1049 (Okla. 2009).

S.C.—All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina, 385 S.C. 428, 685 S.E.2d 163 (2009), cert. dismissed, 2010 WL 621369 (U.S. 2010).

[FN2] Or.—Connall v. Felton, 225 Or. App. 266, 201 P.3d 219 (2009), review denied, 346 Or. 257, 210 P.3d 905 (2009).

[FN3] Unif. Trust Code § 401.

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§ 17. Subject matter

West's Key Number Digest

West's Key Number Digest, Trusts 🔑10

While the subject matter of a trust must be lawful, definite property, there appears to be no limitation or restriction on its kind or nature.

To establish a valid express trust inter vivos, there must be a trust res so sufficiently described or capable of identification that title thereto can pass to the trustee.[FN1] While the subject matter of a trust must be lawful,[FN2] definite[FN3] property, there is no limitation or restriction on its kind or nature, it being the rule that a trust may exist in any property, real or personal, legal or equitable, which is in existence and which, in the eye of a court of equity, is of value.[FN4] Thus, a trust may exist in stocks,[FN5] choses in action,[FN6] contingent interests,[FN7] expectancies,[FN8] life insurance policies or proceeds from policies,[FN9] a deposit in a bank,[FN10] leaseholds,[FN11] and an undivided interest in property.[FN12]

In order that a trust may attach, there must be something tangible to which it can attach.[FN13] For example, an idea, which is not patented, is not property which can be impressed with a trust.[FN14] An obligor has no such interest in his or her own obligation as can be held in trust, and a person cannot have a legal claim against himself or herself whether for the person's own benefit or for the benefit of another.[FN15] A privilege personal in character cannot be the subject of a trust.[FN16] Furthermore, a trust may be created only as to property he or she owns at the time the trust is created.[FN17] On the other hand, other courts have held that a declaration of trust of property executed before the acquisition of the property which is subsequently acquired does not fail for want of the requisite subject matter.[FN18]

[FN1] Mo.—In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D.

2009).

N.Y.—In re Doman, 68 A.D.3d 862, 890 N.Y.S.2d 632 (2d Dep't 2009).

[FN2] Kan.—Shumway v. Shumway, 141 Kan. 835, 44 P.2d 247 (1935).

[FN3] La.—Succession of Burgess, 359 So. 2d 1006 (La. Ct. App. 4th Cir. 1978), writ denied, 360 So. 2d 1178 (La. 1978).

Neb.—Kully v. Goldman, 208 Neb. 760, 305 N.W.2d 800 (1981).

Definite or definitely ascertainable

The subject matter of a trust must be definite or definitely ascertainable from the facts existing at the time of the creation of the trust.

Mont.—Eckart v. Hubbard, 184 Mont. 320, 602 P.2d 988 (1979).

Pa.—First Federal Sav. and Loan Ass'n of Erie v. Great Northern Development Corp., 282 Pa. Super. 337, 422 A.2d 1145 (1980).

[FN4] U.S.—U.S. Trust Co. of New York v. Commissioner of Internal Revenue, 296 U.S. 481, 56 S. Ct. 329, 80 L. Ed. 340 (1936).

[FN5] Ill.—Morris v. The Broadview, 328 Ill. App. 267, 65 N.E.2d 605 (1st Dist. 1946).

As to voting trusts, see C.J.S., Corporations §§ 467 to 471.

Corporation as beneficiary of trust whose corpus contains its own shares

U.S.—Hammond v. U.S., 764 F.2d 88 (2d Cir. 1985).

[FN6] Ill.—Gurnett v. Mutual Life Ins. Co. of New York, 356 Ill. 612, 191 N.E. 250 (1934).

Accounts receivable

Pa.—City of Philadelphia v. Mancini, 431 Pa. 355, 246 A.2d 320 (1968).

[FN7] Cal.—Bank of California v. Connolly, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468 (4th Dist. 1973).

Ga.—Erskine v. Klein, 218 Ga. 112, 126 S.E.2d 755 (1962).

[FN8] Ill.—Gurnett v. Mutual Life Ins. Co. of New York, 356 Ill. 612, 191 N.E. 250 (1934).

[FN9] Ill.—Clemens v. Sandee Mfg. Co., 114 Ill. App. 2d 322, 252 N.E.2d 897 (1st Dist. 1969).

Tex.—Brault v. Bigham, 493 S.W.2d 576 (Tex. Civ. App. Waco 1973), writ refused n.r.e., (July 18, 1973).

[FN10] Cal.—Garrison v. Edward Brown & Sons, 25 Cal. 2d 473, 154 P.2d 377 (1944).

[FN11] U.S.—Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, 113 F.2d 217 (C.C.A. 7th Cir. 1940), judgment rev'd on other grounds, 314 U.S. 63, 62 S. Ct. 15, 86 L. Ed. 47 (1941).

[FN12] U.S.—U.S. Trust Co. of New York v. Commissioner of Internal Revenue, 296 U.S. 481, 56 S. Ct. 329, 80 L. Ed. 340 (1936).

[FN13] U.S.—Elliott v. Bumb, 356 F.2d 749 (9th Cir. 1966).

Mass.—New England Trust Co. v. Sanger, 337 Mass. 342, 149 N.E.2d 598 (1958).

Neb.—Kully v. Goldman, 208 Neb. 760, 305 N.W.2d 800 (1981).

An expectation or hope

Mo.—Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964).

[FN14] Va.—Hise v. Grasty, 159 Va. 535, 166 S.E. 567 (1932).

[FN15] U.S.—Johnson v. Commissioner of Internal Revenue, 108 F.2d 104 (C.C.A. 8th Cir. 1939).

Cal.—Ilse v. Burgess, 28 Cal. App. 2d 654, 83 P.2d 527 (1st Dist. 1938).

[FN16] U.S.—Ridgway v. Ridgway, 454 U.S. 46, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981); In re Carnegie Industries, Inc., 8 B.R. 983 (Bankr. S.D. N.Y. 1981).

[FN17] Mo.—Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964).

[FN18] U.S.—Grubb v. General Contract Purchase Corporation, 94 F.2d 70 (C.C.A. 2d Cir. 1938).

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§ 18. Consideration

West's Key Number Digest

West's Key Number Digest, Trusts ⚷13

The necessity of a valuable consideration to support a trust depends on whether the trust is executed or executory.

A trust may be made with or without consideration.[FN1] The necessity of a valuable consideration to support a trust depends on whether the trust is executed or executory, it being the rule that equity will not enforce a voluntary executory agreement to create or establish a trust, when made without consideration.[FN2] On the other hand, where there is a completely executed voluntary contract to establish a trust and nothing further remains to be done by the grantor to transfer the title, the relation of trustee and beneficiary is established and the equitable rights growing out of such conveyance in trust, although made without consideration, will be recognized and enforced,[FN3] since it is considered as an executed gift, needing no consideration.[FN4] If there is a valuable and sufficient consideration, equity will enforce the trust regardless of whether it is executed or executory.[FN5]

Although consideration for the creation of a trust is illegal, the trust is enforceable if the beneficiary is not a party to the illegality.[FN6]

The consideration need not be paid at the time of execution in order to create an express trust,[FN7] nor must the consideration be furnished by the beneficiary.[FN8] If the consideration is the property of a minor, a person in the place of a parent to such minor has no authority to impress on the property an express trust.[FN9]

[FN1] Conn.—Hebrew University Ass'n v. Nye, 148 Conn. 223, 169 A.2d 641 (1961).

N.C.—Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

Tex.—Petroleum Anchor Equipment, Inc. v. Tyra, 419 S.W.2d 829 (Tex. 1967).

[FN2] Colo.—Reilly v. Korholz, 137 Colo. 20, 320 P.2d 756 (1958).

Fla.—Watson v. St. Petersburg Bank & Trust Co., 146 So. 2d 383 (Fla. Dist. Ct. App. 2d Dist. 1962).

N.Y.—Firstenberg v. Wasserman, 9 A.D.2d 566, 189 N.Y.S.2d 411 (3d Dep't 1959).

Matters held not to constitute consideration

Mass.—Ross v. Ross, 2 Mass. App. Ct. 502, 314 N.E.2d 888 (1974).

Tex.—DeJulio v. Lawler, 593 S.W.2d 837 (Tex. Civ. App. Fort Worth 1980), writ refused n.r.e., (May 21, 1980).

[FN3] U.S.—Haskins' Estate v. U.S., 240 F. Supp. 492 (N.D. Cal. 1965), judgment aff'd, 357 F.2d 492 (9th Cir. 1966).

Ohio—Hoffman v. Vetter, 117 Ohio App. 233, 24 Ohio Op. 2d 1, 192 N.E.2d 249 (9th Dist. Wayne County 1962).

Tex.—City of Mesquite v. Malouf, 553 S.W.2d 639 (Tex. Civ. App. Texarkana 1977), writ refused n.r.e., (Nov. 16, 1977).

[FN4] N.C.—Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956).

Wyo.—McGinnis v. McGinnis, 391 P.2d 927 (Wyo. 1964).

[FN5] Mass.—Ross v. Ross, 2 Mass. App. Ct. 502, 314 N.E.2d 888 (1974).

[FN6] N.Y.—Thompson v. Finholm, 77 N.Y.S.2d 78 (Sup 1948), decree aff'd by, 274 A.D. 992, 85 N.Y.S.2d 314 (1st Dep't 1948).

[FN7] Tex.—Graves v. Graves, 232 S.W. 543 (Tex. Civ. App. 1921), writ refused, (Feb. 1, 1922).

[FN8] Mo.—Ketcham v. Miller, 37 S.W.2d 635 (Mo. 1931).

[FN9] N.C.—Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947).

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§ 19. Time of vesting

West's Key Number Digest

West's Key Number Digest, Trusts ⚷14

Subject to the rule against perpetuities, ordinarily it is no objection to the creation and validity of a trust that the enjoyment of the beneficiary's interest is postponed.

Subject to the rule against perpetuities, which is applicable to trusts,[FN1] and the rule that a trust must arise at the time it is attempted to be created, instead of being brought forth by subsequent and independent circumstances,[FN2] it is no objection to the creation and validity of a trust that the enjoyment of the beneficiary's interest is postponed,[FN3] provided that the legal title passes to the trustee,[FN4] and a present interest vests.[FN5] The fact that the enjoyment of the estate is postponed to a future date does not negative the idea that a present interest is created,[FN6] and the fact that a trust cannot be administered and settled until after the death of the settlor does not invalidate the trust.[FN7] The rule applicable to constructive trusts[FN8] and resulting trusts[FN9] that the trust arises, if at all, at the time title passes, does not apply to express trusts.[FN10]

It is permissible for the settlor to make his or her death the event on the happening of which the estate in interest, previously vested in the present but to be enjoyed in the future, is to come into possession.[FN11]

[FN1] C.J.S., Perpetuities §§ 38 to 49.

[FN2] Ill.—Maley v. Burns, 6 Ill. 2d 11, 126 N.E.2d 695 (1955).

N.Y.—In re Hassett's Will, 1 Misc. 2d 385, 147 N.Y.S.2d 638 (Sur. Ct. 1953), decree

aff'd by, 1 A.D.2d 741, 147 N.Y.S.2d 646 (3d Dep't 1955).

N.C.—Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972).

[FN3] Or.—Bank of California, N. A. v. Department of Revenue, 286 Or. 427, 594 P.2d 1244 (1979).

Tex.—City of Mesquite v. Malouf, 553 S.W.2d 639 (Tex. Civ. App. Texarkana 1977), writ refused n.r.e., (Nov. 16, 1977).

[FN4] § 21.

[FN5] Cal.—Oakland Scavenger Co. v. Gandi, 51 Cal. App. 2d 69, 124 P.2d 143 (1st Dist. 1942).

Kan.—Fry v. McCormick, 170 Kan. 741, 228 P.2d 727 (1951).

[FN6] Colo.—Estate of Brenner, 37 Colo. App. 271, 547 P.2d 938 (App. 1976).

[FN7] Mo.—Masterson v. Plummer, 343 S.W.2d 352 (Mo. Ct. App. 1961).

Ohio—Thomas v. Dye, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 2d Dist. Franklin County 1954).

[FN8] § 176.

[FN9] § 127.

[FN10] Tex.—Frint v. Tate, 162 S.W.2d 737 (Tex. Civ. App. Amarillo 1942).

[FN11] Ohio—Hoffman v. Vetter, 117 Ohio App. 233, 24 Ohio Op. 2d 1, 192 N.E.2d 249 (9th Dist. Wayne County 1962).

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Topic Summary References Correlation Table

§ 20. Statutory provisions

West's Key Number Digest

West's Key Number Digest, Trusts ⚷4

Where there are statutes regulating trusts, a trust, in order to be valid, must be created in accordance with their provisions, but the validity of a trust created before the passage of a statute regulating or prohibiting trusts of that class is not affected thereby, since such statutes are prospective and not retrospective in operation.

A statutory prohibition of some kind is necessary to render invalid any trust which would otherwise be valid at common law.[FN1] Generally, a legislature has the power to enact all manner of legislation with respect to trusts, subject to the rights and limitations ordained in the federal and applicable state constitution.[FN2] Where there are statutes regulating trusts, a trust, in order to be valid, must be created in accordance with their provisions.[FN3] However, the validity of a trust created before the passage of a statute regulating or prohibiting trusts of that class is not affected by the statute, since such statutes are prospective and not retrospective in operation.[FN4] Similarly, a statute imposing certain requirements for an agent to have authority to revoke the trust is inapplicable to any agency instrument executed prior to the effective date of the statute.[FN5] However, other courts have held that a statute applicable to trusts is subject to retroactive effect.[FN6] Moreover, where a statute deals only with procedure, such statute is a remedial one, and it may be retrospective.[FN7] Since the courts do not favor repeals by implication, as a general rule, a statute with respect to trusts is not deemed to repeal an earlier one without express words of repeal, unless the two are in such conflict that both cannot be given effect.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Uniform Trust Code, which contained provision that allowed trusts to be interpreted under the same statutes as wills, did not become effective until several months after the trial court entered judgment in estate administrator's action seeking declaratory judgment as to the validity of a land trust that decedent established with his wife, and, thus, the Uniform Trust Code did not provide a basis for trial court to apply antilapse statute for wills to trust. Code 1975, §§ 19–3B–112, 43–8–225(b). Ex parte Byrom, 47 So. 3d 791 (Ala. 2010).

[END OF SUPPLEMENT]

[FN1] Pa.—In re Harrison's Estate, 322 Pa. 532, 185 A. 766 (1936).

Statute inapplicable

Ohio—In re Hoffman's Estate, 175 Ohio St. 363, 25 Ohio Op. 2d 270, 195 N.E.2d 106 (1963).

[FN2] Pa.—In re Scott's Estate, 418 Pa. 332, 211 A.2d 429 (1965) (disapproved of on other grounds by, In re Ehret's Estate, 427 Pa. 584, 235 A.2d 414 (1967)).

[FN3] U.S.—Dessar v. Bank of America Nat. Trust and Sav. Ass'n, 353 F.2d 468 (9th Cir. 1965).

Cal.—Mount Vernon Memorial Park v. Board of Funeral Directors & Embalmers, 79 Cal. App. 3d 874, 145 Cal. Rptr. 275 (3d Dist. 1978).

Ill.—Memorial Gardens Ass'n, Inc. v. Smith, 16 Ill. 2d 116, 156 N.E.2d 587 (1959).

[FN4] Fla.—Castellano v. Cosgrove, 280 So. 2d 676 (Fla. 1973).

Ind.—Hinds v. McNair, 413 N.E.2d 586 (Ind. Ct. App. 1980).

[FN5] Colo.—Matter of Trust of Franzen, 955 P.2d 1018 (Colo. 1998).

[FN6] Pa.—Estate of Pew, 440 Pa. Super. 195, 655 A.2d 521 (1994).

[FN7] Minn.—In re Gardner's Trust, 266 Minn. 127, 123 N.W.2d 69 (1963).

Okla.—Swanson v. Bates, 1949 OK 231, 202 Okla. 128, 211 P.2d 781 (1949).

[FN8] N.Y.—In re Caswell's Estate, 185 Misc. 599, 56 N.Y.S.2d 507 (Sur. Ct. 1944), decree aff'd by, 269 A.D. 809, 56 N.Y.S.2d 407 (4th Dep't 1945).

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II. Creation, Existence, and Validity
A. Express Trusts
1. General Considerations
b. Elements and Requisites

Topic Summary References Correlation Table

§ 21. Generally

West's Key Number Digest

West's Key Number Digest, Trusts ⚷1

The elements of an express trust are a competent settlor and trustee, intent, sufficient words to create a trust, an ascertainable trust res, certain and ascertained beneficiaries, a legal purpose, and a legal term.

The elements of a valid trust are a competent settlor and trustee, the settlor's intent to create a trust, an ascertainable trust res, a sufficiently ascertainable beneficiary or beneficiaries, a legal purpose, and a legal term.[FN1] Indeed, a trust does not come into existence until the settlor identifies an ascertainable interest in property to be the trust res.[FN2] Under a more simplified view, the requisite elements of a valid and enforceable trust are: (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.[FN3]

Under the Uniform Trust Code, a trust is created only if: (1) the settlor has capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust has a definite beneficiary or is a charitable trust, a trust for the care of an animal, or a specified trust for a noncharitable purpose; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary.[FN4]

Specifically, in order to constitute an express trust, there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created,[FN5] followed by an actual conveyance or transfer,[FN6] of lawful, definite property,[FN7] or estate or interest,[FN8] made by a person capable of making a transfer there-

of,[FN9] for a definite term.[FN10] The conveyance must vest the legal title[FN11] presently[FN12] in a person capable of holding it, to hold as trustee[FN13] for the benefit of a beneficiary or purpose to which the trust fund is to be applied,[FN14] or there must be a retention of title by the owner under circumstances which clearly and unequivocally disclose an intent to hold for the use of another.[FN15] The terms of the trust must be sufficiently declared.[FN16]

An inter vivos trust cannot arise when the settlor retains both full equitable interest and legal title in the trust property, since the essential character of a trust is that the settlor effects a separation of these interests in the trust property.[FN17] Similarly, a revocable inter vivos trust which confers only custodial powers on the trustee, and which expressly bars the trustee from exercising any powers of sale, investment, or reinvestment during the settlor's lifetime without the settlor's consent, is illusory and invalid.[FN18]

[FN1] Wyo.—Matter of Estate of Lohrie, 950 P.2d 1030 (Wyo. 1997).

[FN2] U.S.—Begier v. I.R.S., 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990).

[FN3] Conn.—Swiconek v. Zoning Bd. of Appeals of Town of Glastonbury, 51 Conn. Supp. 190, 978 A.2d 1174 (Super. Ct. 2009).

[FN4] Unif. Trust Code § 402(a).

[FN5] § 43.

[FN6] §§ 66, 67.

[FN7] § 17.

[FN8] U.S.—Warner v. First Nat. Bank of Minneapolis, 236 F.2d 853 (8th Cir. 1956).

Cal.—Monell v. College of Physicians and Surgeons of San Francisco, 198 Cal. App. 2d 38, 17 Cal. Rptr. 744 (1st Dist. 1961).

Ill.—Williams v. Rock River Sav. & Loan Ass'n, 51 Ill. App. 2d 5, 200 N.E.2d 848 (2d Dist. 1964).

[FN9] § 23.

[FN10] Cal.—In re Johnston's Estate, 47 Cal. 2d 265, 303 P.2d 1 (1956).

Colo.—Estate of Brenner, 37 Colo. App. 271, 547 P.2d 938 (App. 1976).

[FN11] § 66.

[FN12] Kan.—Shumway v. Shumway, 141 Kan. 835, 44 P.2d 247 (1935).

[FN13] U.S.—Sherwin v. Oil City Nat. Bank, 229 F.2d 835 (3d Cir. 1956).

Mass.—Horwitz v. Horwitz, 3 Mass. App. Ct. 753, 327 N.E.2d 918 (1975).

Minn.—In re Bush's Trust, 249 Minn. 36, 81 N.W.2d 615 (1957).

As to appointment of trustee by court, see §§ 302, 304.

[FN14] Ga.—Wolfe v. Citizens and Southern Nat. Bank, 221 Ga. 412, 144 S.E.2d 735 (1965).

N.Y.—In re Hinman's Will, 22 Misc. 2d 655, 200 N.Y.S.2d 170 (Sur. Ct. 1960).

Tex.—General Ass'n of Davidian Seventh Day Adventists, Inc. v. General Ass'n of Davidian Seventh Day Adventists, 410 S.W.2d 256 (Tex. Civ. App. Waco 1966), writ refused n.r.e., (Apr. 5, 1967).

[FN15] § 50.

[FN16] § 38.

[FN17] Va.—Ballard v. McCoy, 247 Va. 513, 443 S.E.2d 146 (1994).

[FN18] S.C.—Seifert v. Southern Nat. Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 (1991).

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Topic Summary References Correlation Table

§ 22. Elements of spendthrift trusts

West's Key Number Digest

West's Key Number Digest, Trusts 🔑1

In order to constitute a valid spendthrift trust, there must be an intention to create such a trust, the legal title must be vested in a trustee, who is authorized or directed to pay money or deliver benefits to the beneficiary, and the trust must be an active one.

In order to constitute a valid spendthrift trust, there must be an intention to create such a trust.[FN1] The legal title must be vested in a trustee,[FN2] who is authorized or directed to pay money or deliver benefits to the beneficiary,[FN3] and the trust must be an active one.[FN4] The beneficiary must not possess power to destroy the trust and acquire full power of alienation.[FN5] A spendthrift trust is in the nature of a restraint on alienation.[FN6] The validity of a spendthrift trust will be upheld on the theory that the owner of property, in the free exercise of his or her will in disposing of it, may secure such benefits to the objects of the owner's bounty as he or she sees fit and may, if he or she so desires, limit its benefits to those chosen persons, who part with nothing in return, to the exclusion of creditors and others.[FN7]

According to some courts, the interest of the donee cannot exceed an equitable life estate in the income of the property,[FN8] without title or right to the possession of the property itself,[FN9] securing it against the beneficiary's improvidence or incapacity.[FN10] However, other jurisdictions have approved spendthrift trusts that purport to give the same beneficiary an interest in both the income and principal.[FN11]

It is not necessary that the beneficiary be a spendthrift.[FN12] The court will not inquire into the reason or wisdom of creating a spendthrift trust—it will assume that it is sufficient.[FN13] The validity of a spendthrift trust depends on the sufficiency and legality of the expressed purposes of the trustor and not on the trustor's reasons for creating the trust.[FN14]

A person may not create a spendthrift trust for himself or herself,[FN15] thereby attempting to place the property beyond the reach of creditors.[FN16]

[FN1] U.S.—John Hancock Mut. Life Ins. Co. v. Frost Nat. Bank of San Antonio, 393 F. Supp. 204 (E.D. Tenn. 1974), aff'd, 516 F.2d 901 (6th Cir. 1975) and aff'd, 516 F.2d 901 (6th Cir. 1975).

Kan.—Matter of Sowers' Estate, 1 Kan. App. 2d 675, 574 P.2d 224 (1977).

As to "spendthrift trust" defined, see § 15.

[FN2] Mich.—In re Ford's Estate, 331 Mich. 220, 49 N.W.2d 154 (1951) (overruled on other grounds by, Matter of Estate of Edgar, 425 Mich. 364, 389 N.W.2d 696 (1986)).

[FN3] Iowa—In re Tone's Estates, 240 Iowa 1315, 39 N.W.2d 401 (1949).

[FN4] Mich.—In re Ford's Estate, 331 Mich. 220, 49 N.W.2d 154 (1951) (overruled on other grounds by, Matter of Estate of Edgar, 425 Mich. 364, 389 N.W.2d 696 (1986)).

Tex.—Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. Texarkana 1952), writ refused n.r.e.

[FN5] Iowa—In re Bucklin's Estate, 243 Iowa 312, 51 N.W.2d 412, 34 A.L.R.2d 1327 (1952).

Utah—Cronquist v. Utah State Agr. College, 114 Utah 426, 201 P.2d 280 (1949).

[FN6] U.S.—Mercantile Trust Co. v. Hofferbert, 58 F. Supp. 701 (D. Md. 1944).

[FN7] Iowa—Coster v. Crookham, 468 N.W.2d 802 (Iowa 1991).

[FN8] S.C.—Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943).

[FN9] Iowa—In re Tone's Estates, 240 Iowa 1315, 39 N.W.2d 401 (1949).

S.C.—Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943).

[FN10] Kan.—Matter of Sowers' Estate, 1 Kan. App. 2d 675, 574 P.2d 224 (1977).

Tex.—Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. Texarkana 1952), writ refused n.r.e.

[FN11] Mich.—Matter of Estate of Edgar, 425 Mich. 364, 389 N.W.2d 696 (1986).

N.C.—Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

S.C.—Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943).

[FN12] Minn.—In re Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 (1951).

Tex.—Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. Texarkana 1952), writ refused n.r.e.

[FN13] N.C.—Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

[FN14] Cal.—In re De Lano's Estate, 62 Cal. App. 2d 808, 145 P.2d 672 (2d Dist. 1944).

Del.—Wife, J. B. G. v. Husband, P. J. G., 286 A.2d 256 (Del. Ch. 1971).

[FN15] Ga.—Speed v. Speed, 263 Ga. 166, 430 S.E.2d 348 (1993).

[FN16] Iowa—Coster v. Crookham, 468 N.W.2d 802 (Iowa 1991).

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§ 23. Settlor or creator

West's Key Number Digest

West's Key Number Digest, Trusts ⚷8

Every person competent to make a will or enter into a contract has the power to dispose of his or her property by creating a trust.

Every person competent to make a will or enter into a contract has the power to dispose of his or her property by creating a trust.[FN1] No particular degree of mentality is required to create a trust as long as the settlor can adequately consider the requisite features, and the test is the settlor's ability to comprehend and understand the ordinary, as distinguished from the intricate and complicated affairs of life.[FN2] Thus, a person lacking the capacity to make an ordinary transfer of property has no capacity to create an inter vivos trust,[FN3] and a person who has no title or interest in property can create no trust therein.[FN4] For a settlor to have the power to create a trust, he or she must own a transferable property interest or have a power of disposition over such property interest, or he or she must have the means of contracting with an owner or holder of such a power.[FN5] Where the legal title to property is already held by one person for the benefit of another, the power to declare a further trust resides in the beneficial owner.[FN6]

The state, by legislative enactment, may create a valid trust,[FN7] but in the absence of statute, a court has no power to create a trust.[FN8]

[FN1] U.S.—Harrison v. City Nat. Bank of Clinton, Iowa, 210 F. Supp. 362 (S.D. Iowa 1962).

Colo.—In re Granberry's Estate, 30 Colo. App. 590, 498 P.2d 960 (App. 1972).

Md.—Killen v. Houser, 239 Md. 79, 210 A.2d 527 (1965).

Uniform Trust Code

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

Unif. Trust Code § 601.

[FN2] Mo.—In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009).

[FN3] Wyo.—Hilbert v. Benson, 917 P.2d 1152 (Wyo. 1996).

[FN4] Ala.—Bowden v. Teague, 276 Ala. 142, 159 So. 2d 844 (1963).

Fla.—Columbia Bank for Cooperatives v. Okeelanta Sugar Co-op., 52 So. 2d 670 (Fla. 1951).

[FN5] Wyo.—Jewish Community Ass'n of Casper v. Community First Nat. Bank, 6 P.3d 1264 (Wyo. 2000).

[FN6] U.S.—Buhl v. Kavanagh, 118 F.2d 315 (C.C.A. 6th Cir. 1941).

Iowa—Ross v. Ross, 256 Iowa 326, 126 N.W.2d 369 (1964).

[FN7] Cal.—Del Costello v. State of California, 135 Cal. App. 3d 887, 185 Cal. Rptr. 582 (3d Dist. 1982).

[FN8] S.D.—In re Zech's Estate, 69 S.D. 51, 6 N.W.2d 432 (1942).

Wash.—Stalder v. Pacific Nat. Bank of Seattle, 28 Wash. 2d 638, 183 P.2d 793 (1947).

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Topic Summary References Correlation Table

§ 24. Trustee and beneficiary

West's Key Number Digest

West's Key Number Digest, Trusts 🔑9

Equity will not permit a trust to fail for want of a trustee, although it is essential to a private trust that there be a beneficiary.

While a trustee is essential to a trust, equity will not permit a trust, otherwise perfectly declared, to fail for want of a trustee,[FN1] but will, in case of a vacancy, either appoint a trustee[FN2] or assume the administration and execution of the trust itself.[FN3]

It is essential to a private trust that there be a beneficiary,[FN4] which must be a person or legal entity,[FN5] distinct from the trustee.[FN6] On the other hand, it is permissible for one of several trustees or a sole trustee to also be one of several beneficiaries of a trust, even though conflicts of interest and coincidental benefits to that trustee beneficiary inevitably result.[FN7] Moreover, it is not necessary that the beneficiary be in existence at the time of the creation of the trust, and it is sufficient if it comes into being during the life of the trustee.[FN8] It is not necessary that the beneficiary be named if he or she is so described that he or she is capable of being identified and distinguished from every other human being.[FN9] Persons who have no right to acquire and hold property cannot become beneficiaries and acquire the beneficial interest in property through the medium of a trust.[FN10] Thus, a trust account cannot be established for a beneficiary who the settlor knows is dead and, therefore, the estate of the settlor, rather than the beneficiary's heirs, own the account upon the settlor's death where there is no language reflecting an intent to benefit the beneficiary's estate.[FN11]

A trust may be created for the benefit of minors,[FN12] heirs at law,[FN13] or a school.[FN14] Except where the rights of creditors are concerned,[FN15] a trust may be created for the benefit of the settlor during his or her life, with remainder to other persons,[FN16]

although trusts for the sole use and benefit of the settlor are expressly or impliedly prohibited by some statutes.[FN17]

The extent of the interest of the beneficiary of a trust need not be definite at the time of the creation of the trust if it is definitely ascertainable within the period of the rule against perpetuities.[FN18]

There may be a single beneficiary or several beneficiaries of a trust.[FN19] However, there can be no trust in property for the common benefit of two persons where one of them has power at any time to destroy the trust by disposing of the property.[FN20]

[FN1] § 298.

[FN2] § 302.

[FN3] § 354.

[FN4] § 22.

[FN5] U.S.—Trustees of Graceland Cemetery Imp. Fund v. U. S., 206 Ct. Cl. 609, 515 F.2d 763 (1975).

N.Y.—In re Norton's Estate, 7 Misc. 2d 342, 155 N.Y.S.2d 838 (Sur. Ct. 1956).

Tex.—General Ass'n of Davidian Seventh Day Adventists, Inc. v. General Ass'n of Davidian Seventh Day Adventists, 410 S.W.2d 256 (Tex. Civ. App. Waco 1966), writ refused n.r.e., (Apr. 5, 1967).

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U.S.—Hammond v. U.S., 764 F.2d 88 (2d Cir. 1985).

[FN6] §§ 296, 297.

[FN7] Ark.—Clement v. Larkey, 314 Ark. 489, 863 S.W.2d 580 (1993).

[FN8] La.—Succession of Singlust, 169 So. 2d 10 (La. Ct. App. 2d Cir. 1964), writ refused, 247 La. 262, 170 So. 2d 512 (1965).

Wash.—Senfour Inv. Co. v. King County, 66 Wash. 2d 67, 401 P.2d 319 (1965).

[FN9] U.S.—Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972).

[FN10] N.Y.—Falcone v. Falcone, 24 A.D.2d 50, 263 N.Y.S.2d 768 (4th Dep't 1965).

[FN11] Vt.—In re Estate of Stratton, 165 Vt. 7, 674 A.2d 1281 (1996).

[FN12] U.S.—Walberg v. Smyth, 142 F. Supp. 293 (N.D. Cal. 1956).

[FN13] Cal.—Bixby v. Hotchkis, 58 Cal. App. 2d 445, 136 P.2d 597 (2d Dist. 1943).

[FN14] U.S.—Investors Stock Fund, Inc. v. Roberts, 179 F. Supp. 185 (D. Mont. 1959), judgment aff'd, 286 F.2d 647 (9th Cir. 1961).

[FN15] Cal.—Sefton v. San Diego Trust & Sav. Bank, 106 P.2d 974 (Cal. App. 4th Dist. 1940), certified question accepted.

Kan.—Ackers v. First Nat. Bank of Topeka, 192 Kan. 319, 387 P.2d 840 (1963), decision clarified on other grounds on denial of reh'g, 192 Kan. 471, 389 P.2d 1 (1964).

[FN16] Ark.—Richards v. Worthen Bank & Trust Co., 261 Ark. 890, 552 S.W.2d 228 (1977).

Vt.—Miele v. Miele, 124 Vt. 110, 197 A.2d 787 (1964).

[FN17] Kan.—Mathews v. Savage, 195 Kan. 501, 407 P.2d 559 (1965).

Mass.—Druker v. State Tax Commission, 374 Mass. 198, 372 N.E.2d 208 (1978).

[FN18] Or.—Williamson v. Denison, 185 Or. 249, 202 P.2d 477 (1949).

As to private trusts as subject to rule against perpetuities, see C.J.S., Perpetuities §§ 38 to 42.

[FN19] N.Y.—Alcoma Corp. v. Ackerman, 26 Misc. 2d 678, 207 N.Y.S.2d 137 (Sup 1960).

[FN20] Ga.—Coppage v. Trust Co. Bank, 236 Ga. 360, 223 S.E.2d 720 (1976).

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d. Purposes

Topic Summary References Correlation Table

§ 25. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑11, 11(1) to 11(3)

Subject to statute, a settlor may create a trust for any lawful purpose, and the trust may be created for the settlor's own benefit as well as the benefit of another.

A trust may be created for any purpose that is not illegal.[FN1] In the absence of a statute to the contrary, a settlor may create a trust for any lawful purpose, and the trust may be created for the settlor's own benefit as well as the benefit of another.[FN2] As also stated, except as to a purpose foreign to the public policy of the state[FN3] or within the meaning of a statutory prohibition, the policy of the law to permit a person to make whatever disposition of his or her property the person sees fit allows the person to create an active express trust for any lawful[FN4] purpose the person deems wise and expedient.[FN5] Under the Uniform Trust Code, a trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve, although a trust and its terms must be for the benefit of its beneficiaries.[FN6]

Thus, trusts are valid where they are created for the purpose of applying the income and principal, if necessary, for the benefit of a beneficiary;[FN7] of conserving property pending exercise of a power of appointment after a life estate;[FN8] of paying annuities;[FN9] of avoiding the costs and delays of probate administration;[FN10] and of keeping up a grave or burial lot.[FN11] On the other hand, some useful purpose must be served by a trust, and a mere dry trust is invalid.[FN12] When a statute regulating trusts is applicable only to realty, trusts in personalty may be created for any purpose not unlawful.[FN13]

The purpose of a trust governs its administration and enforcement.[FN14] With respect to a pour over trust, one of its primary purposes is to facilitate administration of the trust by con-

solidating all family assets.[FN15]

Under a statute manifesting an intention to abolish all uses and trusts except such as are expressly permitted by statute, a trust for a purpose not within those enumerated by statute is invalid,[FN16] and there must be something to indicate that the settlor contemplated one of the classes of trusts enumerated by the statute.[FN17] Under some statutes, trusts may be created for the purpose of conveying merely[FN18] or of selling real property for the benefit of annuitants or legatees.[FN19]

[FN1] S.D.—Willers v. Wettestad, 510 N.W.2d 676 (S.D. 1994).

[FN2] Ark.—Aycock Pontiac, Inc. v. Aycock, 335 Ark. 456, 983 S.W.2d 915 (1998).

[FN3] Iowa—In re Marriage of Hoak, 364 N.W.2d 185 (Iowa 1985).

[FN4] Ariz.—Ruelas v. Ruelas, 7 Ariz. App. 98, 436 P.2d 490 (1968).

Ark.—Richards v. Worthen Bank & Trust Co., 261 Ark. 890, 552 S.W.2d 228 (1977).

Iowa—Cedar Memorial Park Cemetery Ass'n v. Personnel Associates, Inc., 178 N.W.2d 343 (Iowa 1970).

As to illegality of provision, generally, see § 83.

Any purpose in which a contract may be made

Okla.—C & C Tile Co., Inc. v. Independent School Dist. No. 7 of Tulsa County, 1972 OK 137, 503 P.2d 554 (Okla. 1972).

[FN5] U.S.—Murry v. Hale, 203 F. Supp. 583 (E.D. Ark. 1962).

N.J.—Fidelity Union Trust Co. v. Margetts, 7 N.J. 556, 82 A.2d 191 (1951).

[FN6] Unif. Trust Code § 404.

[FN7] Okla.—Barnes v. Barnes, 1955 OK 34, 280 P.2d 996 (Okla. 1955).

Pa.—In re Bergland's Estate, 372 Pa. 1, 92 A.2d 207 (1952).

[FN8] Pa.—In re Kern's Estate, 296 Pa. 348, 145 A. 824, 66 A.L.R. 1342 (1929).

[FN9] N.Y.—In re Fischer's Will, 307 N.Y. 149, 120 N.E.2d 688 (1954).

[FN10] Cal.—Stoltenberg v. Newman, 179 Cal. App. 4th 287, 101 Cal. Rptr. 3d 606 (2d Dist. 2009), review denied, (Feb. 3, 2010).

Neb.—In re Estate of Chrisp, 276 Neb. 966, 759 N.W.2d 87 (2009).

[FN11] Ark.—Hammond v. Stringer, 222 Ark. 189, 258 S.W.2d 46 (1953).

N.Y.—In re Smith's Will, 67 N.Y.S.2d 330 (Sur. Ct. 1947).

As to care, maintenance, or improvement of burial grounds and monuments as charitable purpose, see C.J.S., Charities § 11.

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Validity, construction, and application of statutes or ordinances regulating perpetual-care trust funds of cemeteries and mausoleums, 54 A.L.R.5th 681.

[FN12] N.J.—Fidelity Union Trust Co. v. Margetts, 7 N.J. 556, 82 A.2d 191 (1951).

Pa.—In re Bergland's Estate, 372 Pa. 1, 92 A.2d 207 (1952).

As to execution by statute of uses, see § 252.

[FN13] N.Y.—In re Palumbo's Estate, 284 A.D. 834, 132 N.Y.S.2d 386 (4th Dep't 1954).

[FN14] Iowa—Eldred v. Merchants Nat. Bank of Cedar Rapids, 468 N.W.2d 221 (Iowa 1991).

[FN15] Kan.—Matter of Will of Daniels, 247 Kan. 349, 799 P.2d 479 (1990).

[FN16] Minn.—In re Schmidt's Will, 256 Minn. 64, 97 N.W.2d 441 (1959).

[FN17] Okla.—Barnes v. Barnes, 1955 OK 34, 280 P.2d 996 (Okla. 1955).

[FN18] Mont.—In re Strode's Estate, 118 Mont. 540, 167 P.2d 579 (1946).

[FN19] N.Y.—In re Graczyk's Will, 66 N.Y.S.2d 750 (Sur. Ct. 1946).

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§ 26. Purposes of spendthrift trusts

West's Key Number Digest

West's Key Number Digest, Trusts 11(1) to 11(3), 12

Spendthrift trusts, that is, trusts intended to secure the trust fund against the improvidence of the beneficiary by protecting it against his or her creditors and rendering it inalienable by the beneficiary before payment, have generally been upheld as valid.

Although at common law and under some statutes the rule is to the contrary,[FN1] spendthrift trusts, that is, trusts intended to secure the trust fund against the improvidence of the beneficiary by protecting it against his or her creditors and rendering it inalienable by him or her before payment, have generally been upheld as valid.[FN2] Spendthrift trusts, not repugnant to the law, are allowed to give effect to the will of the donor and not because of any special consideration for the donee.[FN3] A settlor is under no legal or moral obligation to the creditors of the beneficiary of a spendthrift trust, and the creation of such a trust takes nothing from a creditor of the beneficiary to which the creditor previously had the right to look for payment.[FN4] On the other hand, the courts in at least one jurisdiction have refused to extend the doctrine of spendthrift trusts to trusts in which the trustee's duty to pay the beneficiary is absolute.[FN5]

Public policy considerations behind enforcing spendthrift trust provisions include the right of donors to dispose of their property as they wish, the public interest in protecting spendthrift beneficiaries from personal pauperism, so that they do not become public burdens, and the responsibility of creditors to make themselves aware of their debtors' spendthrift trust protections.[FN6]

A spendthrift trust for the benefit of the donor, during life, is invalid, both as to past and future creditors,[FN7] even though there is a provision for a contingent remainder in a third

person.[FN8] A spendthrift trust created for the benefit of the donor, however, is not invalid or revocable as far as the settlor is concerned,[FN9] but it is ineffective against the donor's right to alienate his or her beneficial interest thereunder.[FN10]

When a statute specifically lists exceptions to spendthrift protection, those exceptions are the only ones allowed by law.[FN11]

[FN1] U.S.—Seidenberg v. Seidenberg, 126 F. Supp. 19 (D. D.C. 1954).

R.I.—Industrial Nat. Bank v. Budlong, 106 R.I. 780, 264 A.2d 18 (1970).

[FN2] Mich.—Matter of Estate of Edgar, 425 Mich. 364, 389 N.W.2d 696 (1986).

W.Va.—Keller v. Keller, 169 W. Va. 372, 287 S.E.2d 508 (1982).

As to elements and requisites of spendthrift trusts, see § 22.

As to "spendthrift trust" defined, see § 15.

Authorized by statute

Cal.—Chatard v. Oveross, 179 Cal. App. 4th 1098, 101 Cal. Rptr. 3d 883 (2d Dist. 2009), review denied, (Feb. 10, 2010).

Trust unenforceable

Settlor was sole beneficiary of trust, and thus trust's spendthrift provision was unenforceable, even though trust did not allow settlor to take distribution from principal during his lifetime, and even though trust named contingent beneficiaries in event settlor failed to exercise his power of appointment; settlor retained general power of appointment enabling him to dispose of trust property to anyone, including his estate or his creditors.

Ga.—Phillips v. Moore, 286 Ga. 619, 690 S.E.2d 620 (2010).

[FN3] Va.—Jackson v. Fidelity and Deposit Co. of Maryland, 269 Va. 303, 608 S.E.2d 901 (2005).

[FN4] S.C.—Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943).

[FN5] N.H.—Athorne v. Athorne, 100 N.H. 413, 128 A.2d 910 (1957).

[FN6] Miss.—Sligh v. First Nat. Bank of Holmes County, 704 So. 2d 1020 (Miss. 1997).

[FN7] U.S.—Matter of Witlin, 640 F.2d 661 (5th Cir. 1981).

Mo.—Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust

Fund, 583 S.W.2d 154 (Mo. 1979).

[FN8] Miss.—Deposit Guaranty Nat. Bank v. Walter E. Heller & Co., 204 So. 2d 856 (Miss. 1967).

Pa.—Murphey v. C. I. T. Corp., 347 Pa. 591, 33 A.2d 16 (1943).

[FN9] U.S.—Liberty Nat. Bank v. Hicks, 173 F.2d 631, 9 A.L.R.2d 1355 (D.C. Cir. 1948).

Mich.—Fornell v. Fornell Equipment, Inc., 390 Mich. 540, 213 N.W.2d 172 (1973).

[FN10] Tenn.—Rose v. Third Nat. Bank, 27 Tenn. App. 553, 183 S.W.2d 1 (1944).

[FN11] Va.—Jackson v. Fidelity and Deposit Co. of Maryland, 269 Va. 303, 608 S.E.2d 901 (2005).

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§ 27. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑17, 17(1)

Whether an express trust is required to be in writing or may be created or proved by parol depends on the statutory provisions relating thereto, if any, in the jurisdiction.

Except as otherwise provided by statute, an enforceable trust can be created without a writing.[FN1] While in many jurisdictions express trusts must be created or proved by a writing and cannot be created or proved by parol,[FN2] it is more accurate to state that in such jurisdictions, under statutes to that effect, an express trust in land cannot be created or proved by parol,[FN3] but that in most of such jurisdictions an express trust in personalty can be created or proved by parol.[FN4] A parol trust cannot be found in the absence of an agreement.[FN5]

Under the Uniform Trust Code, except as required by a statute other than the Uniform Trust Code, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.[FN6]

[FN1] U.S.—Stone v. Stone, 330 F. Supp. 1026 (W.D. Va. 1971), aff'd in part, rev'd in part on other grounds, 460 F.2d 64 (4th Cir. 1972).

Fla.—In re Craft's Estate, 320 So. 2d 874 (Fla. Dist. Ct. App. 4th Dist. 1975).

Or.—Smiley v. King, 278 Or. 555, 564 P.2d 1348 (1977).

[FN2] U.S.—Wallace v. District No. 2, Marine Engineers Benev. Ass'n AFL-CIO, 392 F. Supp. 899 (E.D. La. 1975).

Ark.—Horton v. Koner, 12 Ark. App. 38, 671 S.W.2d 235 (1984).

Pa.—McHenry v. Stapleton, 443 Pa. 186, 278 A.2d 892 (1971).

[FN3] § 31.

[FN4] § 28.

[FN5] Ky.—Hoheimer v. Hoheimer, 30 S.W.3d 176 (Ky. 2000).

[FN6] Unif. Trust Code § 407.

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§ 28. Trusts in personal property

West's Key Number Digest

West's Key Number Digest, Trusts 17(2)

As a general rule, express trusts in personalty may be created and established or engrafted on a written instrument by parol.

Generally, express trusts in personal property may be created and established or engrafted on a written instrument by parol, not only in those jurisdictions where there is no provision relating specifically to the creation of trusts[FN1] but also in those jurisdictions in which the statutes requiring declarations of trust to be in writing by their express terms relate only to trusts in real property.[FN2] Thus, inter vivos trusts of personal property may be created by deed, may rest entirely on parol, or may be partially in writing and partially in parol, provided that the words employed are sufficient to create a trust.[FN3] A trust created by parol is valid, if it related only to personal property at the time of its creation, even though it subsequently affects real property.[FN4] Where a statute declares that all express trusts must be created or declared in writing, a trust in personal property cannot be created by parol.[FN5]

Where a trust in personal property may be created by parol, no particular words are required to create or declare such a trust.[FN6] However, a voluntary executory agreement for the creation of an oral trust in personalty or an unexecuted or imperfect gift of personalty is insufficient to establish the existence of a completed verbal trust.[FN7]

[FN1] U.S.—Stone v. Stone, 460 F.2d 64 (4th Cir. 1972).

Ark.—Moore v. Lawrence, 252 Ark. 759, 480 S.W.2d 941 (1972).

Kan.—Wehking v. Wehking, 213 Kan. 551, 516 P.2d 1018 (1973).

[FN2] U.S.—Leggett's Estate v. U. S., 418 F.2d 1257 (3d Cir. 1969).

Cal.—Cohen v. Meyers, 6 Cal. App. 3d 878, 86 Cal. Rptr. 456 (2d Dist. 1970).

Mo.—Gardner v. Bernard, 401 S.W.2d 415 (Mo. 1966).

Inadequate writing

Vt.—Monti v. Granite Sav. Bank & Trust Co., 133 Vt. 204, 333 A.2d 106 (1975).

[FN3] Fla.—Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993).

[FN4] Vt.—Mahoney v. Leddy, 126 Vt. 98, 223 A.2d 456 (1966).

[FN5] Ga.—Beckwith v. Peterson, 227 Ga. 403, 181 S.E.2d 51 (1971).

R.I.—Desnoyers v. Metropolitan Life Ins. Co., 108 R.I. 100, 272 A.2d 683 (1971).

[FN6] Ala.—Merchants Nat. Bank of Mobile v. Bertolla, 245 Ala. 662, 18 So. 2d 378 (1944).

Mo.—Eldridge v. Logan, 217 S.W.2d 588 (Mo. Ct. App. 1949).

[FN7] N.Y.—Payne v. Connelly, 32 A.D.2d 693, 299 N.Y.S.2d 1013 (3d Dep't 1969).

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§ 29. Agreements as to proceeds of sale of land

West's Key Number Digest

West's Key Number Digest, Trusts 17(7)

A parol agreement to hold the proceeds of a sale of land in trust for another constitutes a trust in personalty and is enforceable if the agreement is unconnected with or separable from any trust in the land itself.

Even where an express trust in land cannot be established by parol,[FN1] a parol agreement, on sufficient consideration, to hold the proceeds of a sale of land in trust for another constitutes a trust in personal property and is enforceable if the agreement is unconnected with or separable from any trust in the land itself,[FN2] or if that part of the trust relating to the land has been fully performed,[FN3] or the promise to hold the proceeds in trust is made or renewed after the land has been sold.[FN4] However, where there were no proceeds in existence at the time the agreement was made, and no new promise was made after the sale of the land,[FN5] or the agreement as to the proceeds is otherwise inseparable from a trust in the land,[FN6] the parol agreement is within the statute of frauds and unenforceable unless it has been executed. On the other hand, it has also been held that if the land has been converted into money, a trust as to the proceeds is enforceable although there was no declaration of trust after the conversion.[FN7] Applying these rules, a valid parol trust is created by an agreement to share the profits arising on a sale of land.[FN8]

An agreement, made at the time of executing a deed, that the grantee shall hold the title in trust for the grantor and, on sale of the land, pay the proceeds to him or her is within the statute of frauds forbidding express trusts in lands by parol.[FN9] An oral trust to pay over the income from certain lands may in a proper case be recognized as a valid oral trust.[FN10]

[FN1] § 31.

[FN2] Mass.—Morris v. Morris, 3 Mass. App. Ct. 751, 327 N.E.2d 917 (1975).

[FN3] N.C.—Hodges v. Hodges, 256 N.C. 536, 124 S.E.2d 524 (1962).

[FN4] Ala.—Smith v. Davis, 352 So. 2d 451 (Ala. Civ. App. 1977).

[FN5] Ala.—Westcott v. Sharp, 256 Ala. 418, 54 So. 2d 758 (1951).

[FN6] Md.—Juliano v. Juliano, 36 Md. App. 1, 372 A.2d 1084 (1977).

[FN7] N.C.—Hodges v. Hodges, 256 N.C. 536, 124 S.E.2d 524 (1962).

[FN8] Mich.—Price v. Nellist, 316 Mich. 418, 25 N.W.2d 512 (1947).

N.J.—Chew v. Markeim, 125 N.J.L. 595, 16 A.2d 337 (N.J. Sup. Ct. 1941).

[FN9] Ill.—Ramsay v. Ramsay, 10 Ill. App. 2d 459, 135 N.E.2d 172 (1st Dist. 1956).

[FN10] Ala.—First Nat. Bank of Birmingham v. Huddleston, 242 Ala. 437, 6 So. 2d 893 (1942).

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§ 30. Execution or part performance of trust and waiver of statute

West's Key Number Digest

West's Key Number Digest, Trusts 17(8)

A parol trust obnoxious to the statute of frauds is merely voidable by the trustee, who may waive the statute, and a parol trust is valid if acknowledged by the trustee or fully or even partly performed.

The statute of frauds relating to trust concerns only the parties to the trust agreement and their privies.[FN1] Accordingly, a parol trust obnoxious to the statute of frauds is not absolutely void, but merely voidable at the election of the trustee[FN2] who may waive the benefit of the statute.[FN3] If the existence of the trust is acknowledged by the trustee,[FN4] or the trust has been fully performed and executed,[FN5] it will be upheld and the statute of frauds deemed to have no application, and the acknowledgment of the trust or the performance thereof may be shown by parol.[FN6] This is particularly true where the trustee has by his or her conduct in ratifying and affirming the trust induced others to change their position because of it.[FN7] A deed absolute in form may be shown by parol evidence to have been made in trust for the benefit of the grantor, where the grantor remains in possession of the land.[FN8]

An express parol trust may be taken out of the statute of frauds by part performance,[FN9] but the acts relied on for such purpose must be those of the beneficiary rather than of the grantor.[FN10]

[FN1] Kan.—Powell v. Leon, 172 Kan. 267, 239 P.2d 974 (1952).

[FN2] Mass.—Perkins v. Hilton, 329 Mass. 291, 107 N.E.2d 822, 33 A.L.R.2d 1281 (1952).

S.D.—Schwartzle v. Dale, 74 S.D. 467, 54 N.W.2d 361 (1952).

[FN3] U.S.—In re German, 193 F. Supp. 948 (S.D. Ill. 1961).

Ill.—Klass v. Hallas, 16 Ill. 2d 161, 157 N.E.2d 261 (1959).

[FN4] Cal.—Jose v. Pacific Tile & Porcelain Co., 251 Cal. App. 2d 141, 58 Cal. Rptr. 880 (1st Dist. 1967).

Iowa—Ross v. Ross, 256 Iowa 326, 126 N.W.2d 369 (1964).

[FN5] Cal.—Casa Colina Convalescent Home for Crippled Children, Inc. v. Wiest, 214 Cal. App. 2d 161, 29 Cal. Rptr. 407 (4th Dist. 1963).

Vt.—Mahoney v. Leddy, 126 Vt. 98, 223 A.2d 456 (1966).

[FN6] § 70.

[FN7] Md.—Dove v. White, 211 Md. 228, 126 A.2d 835 (1956).

[FN8] Cal.—Jose v. Pacific Tile & Porcelain Co., 251 Cal. App. 2d 141, 58 Cal. Rptr. 880 (1st Dist. 1967).

[FN9] Iowa—Ross v. Ross, 256 Iowa 326, 126 N.W.2d 369 (1964).

Kan.—King v. Robbins, 193 Kan. 70, 392 P.2d 154 (1964).

As to part performance of contracts within statute of frauds, generally, see C.J.S., Frauds, Statute of §§ 187 to 200.

[FN10] Conn.—Hanney v. Clark, 124 Conn. 140, 198 A. 577 (1938).

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§ 31. Statutes relating specifically to trusts

West's Key Number Digest

West's Key Number Digest, Trusts ⚷17(3)

In jurisdictions which have adopted some form of statute similar to the original statute of frauds relating to trusts, or recognize such rule, express trusts in lands cannot be created or declared, or manifested and proved, by parol, nor can an express trust be engrafted by parol on a conveyance absolute in form.

At common law, a trust can be created by parol,[FN1] but in those states in which the English statute of frauds, requiring that all declarations or creations of trusts in lands, tenements, or hereditaments be in writing, has been substantially reenacted, the rule of construction adopted is that the trust need not be created by writing, but the evidence of the existence of the trust must be in writing.[FN2] In at least one jurisdiction, though, it is the requirement that all express trusts must be created or declared in writing.[FN3]

While a parol trust in land is valid and enforceable at common law and general equity jurisprudence,[FN4] it is the rule, where the provisions of the statute of frauds, which are expressly applicable to trusts in lands, tenements, and hereditaments, have been enacted, that express trusts in lands cannot be created[FN5] or declared or cannot be manifested and proved, according to the particular wording of the statute invoked, by parol.[FN6] The operation of the rule is not affected by the fact that the parties to the trust agreement are copartners.[FN7] However, the statute of frauds does not prevent proof of the existence of a trust in favor of the partnership where the title stands in the names of the partners or in that of a third person.[FN8]

Generally, except in jurisdictions where there is no provision in the statute of frauds relating specifically to trusts, an express trust cannot be engrafted by parol on a deed, devise, as-

signment, or other conveyance absolute in form,[FN9] at least in the absence of fraud or a similar factor in the procurement of the execution of the deed,[FN10] and particularly after a long period has elapsed.[FN11] However, the rule does not apply to an absolute deed which is not valid both in form and substance, as where it is wholly without consideration.[FN12]

Since a resulting trust is not within the statute of frauds,[FN13] such a trust is not converted into an express trust, to which the statute would apply, by a writing subsequently made, acknowledging the trust.[FN14]

Where the English statute of frauds is part of a state's common law, an express trust in real estate need not be created in writing, but some memorandum manifesting and proving the trust must exist.[FN15] Except for such jurisdictions,[FN16] a valid trust in land may ordinarily be created and established by parol in jurisdictions where a statute of frauds specifically addressing trusts has not been enacted in any form.[FN17] In these jurisdictions, generally, an express trust may, by parol, be engrafted on an absolute deed,[FN18] provided that the declaration of trust is contemporaneous with or a condition of the giving of the deed and is not made thereafter.[FN19] A provision that contracts concerning land shall be in writing does not affect the validity of trusts, or the evidence by which they may be established, in some of the jurisdictions in which the statute of frauds does not deal specifically with the creation of trusts,[FN20] but in other jurisdictions of this class, a general provision that all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance on real estate, shall be by deed, forbids the creation of an express trust in land by parol,[FN21] although these jurisdictions do not apply this rule to resulting trusts[FN22] or constructive trusts.[FN23]

[FN1] U.S.—Bricklayers, Masons and Plasterers Intern. Union of America, Local Union No. 15, Orlando, Florida v. Stuart Plastering Co., Inc., 512 F.2d 1017 (5th Cir. 1975).

Ariz.—King v. Uhlmann, 103 Ariz. 136, 437 P.2d 928 (1968).

Fla.—Fraser v. Lewis, 187 So. 2d 684 (Fla. Dist. Ct. App. 3d Dist. 1966).

[FN2] Ariz.—Remele v. Hamilton, 78 Ariz. 45, 275 P.2d 403 (1954).

N.J.—Vreeland v. Dawson, 55 N.J. Super. 456, 151 A.2d 62 (Ch. Div. 1959).

[FN3] Ga.—Hancock v. Hancock, 205 Ga. 684, 54 S.E.2d 385 (1949).

[FN4] Ky.—Horn v. Horn, 562 S.W.2d 319 (Ky. Ct. App. 1978).

Okla.—Ellis v. Benbrook, 1962 OK 79, 370 P.2d 543 (Okla. 1962).

[FN5] Neb.—Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

[FN6] Mich.—Children of Chippewa, Ottawa and Potawatomy Tribes v. Regents of

University of Michigan, 104 Mich. App. 482, 305 N.W.2d 522 (1981).

N.J.—Matter of Catanio, 306 N.J. Super. 439, 703 A.2d 988 (App. Div. 1997).

Or.—Foster v. Foster, 384 S.C. 380, 682 S.E.2d 312 (Ct. App. 2009).

As to parol evidence to explain apparently absolute deed, see § 70.

As to application of statute of frauds to equitable estates in land, generally, see C.J.S., Frauds, Statute of § 75.

[FN7] Mass.—Damon v. Damon, 9 Mass. App. Ct. 923, 404 N.E.2d 666 (1980).

N.Y.—Frieda Popkov Corp. v. Stack, 198 Misc. 826, 103 N.Y.S.2d 507 (Sup 1950).

[FN8] Cal.—En Taik Ha v. Kang, 187 Cal. App. 2d 84, 9 Cal. Rptr. 425 (2d Dist. 1960).

[FN9] Ariz.—Murillo v. Hernandez, 79 Ariz. 1, 281 P.2d 786 (1955).

Ga.—Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956).

Statute excepting implied trust

Pa.—Semenza v. Alfano, 443 Pa. 201, 279 A.2d 29 (1971).

[FN10] Ala.—Ammons v. Ammons, 253 Ala. 82, 42 So. 2d 776 (1949).

N.C.—Vincent v. Corbett, 244 N.C. 469, 94 S.E.2d 329 (1956).

[FN11] Ark.—Blalock v. Blalock, 222 Ark. 299, 258 S.W.2d 891 (1953).

[FN12] Ga.—Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943).

[FN13] § 126.

[FN14] N.C.—Strange v. Sink, 27 N.C. App. 113, 218 S.E.2d 196 (1975).

[FN15] N.M.—Aragon v. Rio Costilla Co-op. Livestock Ass'n, 112 N.M. 152, 812 P.2d 1300 (1991).

[FN16] Conn.—Van Auken v. Tyrrell, 130 Conn. 289, 33 A.2d 339 (1943).

[FN17] Ark.—White v. Hickey, 8 Ark. App. 264, 651 S.W.2d 467 (1983).

N.C.—High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979).

Tenn.—Linder v. Little, 490 S.W.2d 717 (Tenn. Ct. App. 1972).

[FN18] N.C.—Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

Tex.—Muhm v. Davis, 580 S.W.2d 98 (Tex. Civ. App. Houston 1st Dist. 1979), writ refused n.r.e., (Sept. 12, 1979).

[FN19] N.C.—Beasley v. Wilson, 267 N.C. 95, 147 S.E.2d 577 (1966).

Tenn.—Linder v. Little, 490 S.W.2d 717 (Tenn. Ct. App. 1972).

[FN20] Pa.—Nirmaier v. Hamilton, 467 Pa. 355, 356 A.2d 788 (1976).

[FN21] Wash.—Dowgialla v. Knevage, 48 Wash. 2d 326, 294 P.2d 393 (1956).

[FN22] § 126.

[FN23] § 182.

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§ 32. Agreement by grantee to hold in trust or reconvey

West's Key Number Digest

West's Key Number Digest, Trusts 🔑17(4), 17(5)

Except insofar as the rule may differ under statutes of frauds not relating specifically to trusts, it is generally held that an oral promise or agreement to hold property acquired by an absolute conveyance in trust for the grantor or other designated persons does not create an enforceable trust under the statute of frauds.

A verbal promise or agreement by the grantee in an absolute conveyance, either contemporaneous with, or prior or subsequent to, the conveyance, to hold the land conveyed in trust for the grantor or other designated persons, does not create an enforceable trust under the statute of frauds or similar statutes,[FN1] unless the circumstances surrounding the transaction are such as to show a resulting trust[FN2] or a constructive trust.[FN3] A parol agreement by the grantee in an absolute conveyance to reconvey, on request, to the grantor,[FN4] or to some other person who may be designated in the agreement,[FN5] is within the statute of frauds and unenforceable. Thus, where there is no language in a deed indicating the reservation of a life estate, there is nothing from which an intention to create a trust can be ascertained, and the law should not imply such an intention from the fact that the conveyance is either voluntary or without monetary consideration.[FN6] However, on the other hand, where the statute is used as a cover to fraud, equity will grant relief.[FN7] The same general rule applies to property that has been acquired pursuant to judicial process.[FN8]

In jurisdictions where, owing to the absence of any statute of frauds specifically addressing trusts, parol trusts in land are or were generally held valid,[FN9] agreements by which a parol trust is impressed on land conveyed by absolute deed have in some cases and under some circumstances been held valid, and in other cases invalid.[FN10]

Under one state statute expressly so providing, if a conveyance of land, not fraudulent, is made to one in trust either for the grantor or a third person, such trust may be enforced, even though it is not disclosed on the face of the conveyance or evidenced by a writing,[FN11] and where the statute so providing contains the general prohibition against parol trusts,[FN12] the method set out in the provision is the only permissible way of creating an oral express trust.[FN13]

[FN1] Ala.—Finch v. York, 294 Ala. 382, 318 So. 2d 249 (1975).

Ga.—Wells v. Wells, 216 Ga. 384, 116 S.E.2d 586 (1960).

Ky.—Hoheimer v. Hoheimer, 30 S.W.3d 176 (Ky. 2000).

As to effect of adoption of statute of frauds relating to trusts, generally, see § 31.

[FN2] § 140.

[FN3] § 190.

[FN4] Mass.—Ranicar v. Goodwin, 326 Mass. 710, 96 N.E.2d 853 (1951).

N.M.—Vehn v. Bergman, 57 N.M. 351, 258 P.2d 734 (1953).

As to promises to reconvey as within statute of frauds, generally, see C.J.S., Frauds, Statute of § 82.

[FN5] Md.—Grimes v. Grimes, 184 Md. 59, 40 A.2d 58 (1944).

Okla.—Adams v. Adams, 1952 OK 246, 208 Okla. 378, 256 P.2d 458 (1952).

[FN6] Ky.—Hoheimer v. Hoheimer, 30 S.W.3d 176 (Ky. 2000).

[FN7] Ala.—Finch v. York, 294 Ala. 382, 318 So. 2d 249 (1975).

Ark.—Thom v. Geyer, 254 Ark. 716, 497 S.W.2d 689 (1973).

[FN8] Ga.—King v. King, 203 Ga. 811, 48 S.E.2d 465, 2 A.L.R.2d 1181 (1948).

N.C.—McDaniel v. Fordham, 261 N.C. 423, 135 S.E.2d 22 (1964).

[FN9] § 31.

[FN10] Or.—City of Medford v. Bessonette, 255 Or. 53, 463 P.2d 865 (1970).

[FN11] W.Va.—Cain v. Keeley, 129 W. Va. 642, 41 S.E.2d 185 (1946).

[FN12] § 31.

[FN13] W.Va.—Cain v. Keeley, 129 W. Va. 642, 41 S.E.2d 185 (1946).

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Topic Summary References Correlation Table

§ 33. Agreement as to land to be purchased

West's Key Number Digest

West's Key Number Digest, Trusts ⚷17(6)

Except where statutes do not forbid parol trusts of land, a parol promise or agreement by one person to purchase lands and hold them in trust for, or convey to, another is within the statute of frauds and unenforceable.

A parol promise or agreement by one person to purchase lands and hold them in trust for, or convey to, another is within the statute of frauds, and not enforceable as an express trust.[FN1] Similarly, an oral agreement to divide real property violates the statute of frauds and cannot be specifically performed.[FN2] A verbal agreement between two or more persons to make a joint purchase of lands, title to be taken in the name of one for the benefit of all, is also unenforceable,[FN3] as is a parol promise or agreement by one to purchase at an execution, foreclosure, or other judicial sale and hold in trust for the judgment debtor or convey to him or her on reimbursement of the purchase price.[FN4] A like rule applies to a parol agreement to purchase land at a judicial sale, for the benefit of the debtor's spouse.[FN5] However, an oral partnership agreement among individuals for the purpose of acquiring and developing real property for profit is not within the statute of frauds.[FN6]

In jurisdictions having no statute explicitly forbidding parol trusts, parol agreements to purchase land at a judicial or other sale and hold it for the benefit of another,[FN7] provided that the agreement is made before or at the time of the sale, are valid in some cases.[FN8]

[FN1] Miss.—McIlwain v. Doby, 238 Miss. 839, 120 So. 2d 553 (1960).

Mo.—Hergenreter v. Sommers, 535 S.W.2d 513 (Mo. Ct. App. 1976).

Okla.—Powell v. Chastain, 1957 OK 298, 318 P.2d 859 (Okla. 1957).

Creation of:

As to constructive trust by agreement as to land to be purchased, see § 191.

As to resulting trust by agreement to purchase or hold for joint benefit, see § 139.

As to requisites of agreement by person acquiring title to hold for, or convey to, use of another, generally, see § 54.

[FN2] Va.—Gibbens v. Hardin, 239 Va. 425, 389 S.E.2d 478 (1990).

[FN3] Ala.—Talley v. Talley, 248 Ala. 84, 26 So. 2d 586 (1946).

[FN4] W.Va.—Ross v. Midelburg, 129 W. Va. 851, 42 S.E.2d 185 (1947).

[FN5] W.Va.—Cain v. Keeley, 129 W. Va. 642, 41 S.E.2d 185 (1946).

[FN6] Va.—Wingate v. Coombs, 237 Va. 501, 379 S.E.2d 304 (1989).

[FN7] Ky.—Appleby v. Buck, 351 S.W.2d 494 (Ky. 1961).

Miss.—McIlwain v. Doby, 238 Miss. 839, 120 So. 2d 553 (1960).

N.C.—Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

[FN8] Ky.—Weissinger v. Weissinger, 302 S.W.2d 97 (Ky. 1957).

N.C.—Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981).

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Topic Summary References Correlation Table

§ 34. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑19, 19.1, 21(1)

The writing declaring or manifesting the existence of the trust need not be executed contemporaneously with the transfer of the legal title and the creation of the trust but may be executed subsequent thereto.

Although the recommended practice for establishing a trust is to execute the documents of transfer along with the declaration of trust,[FN1] it is not necessary that the writing declaring or manifesting the existence of the trust be executed contemporaneously with the transfer of the legal title and the creation of the trust,[FN2] and it is sufficient if executed subsequent thereto.[FN3]

The mere designation of a grantee as "trustee" in a deed, without other language showing that a trust exists, does not make the grantee a trustee of a trust.[FN4] Thus, when an instrument conveying to the grantee "as trustee" does not identify trust beneficiaries or reference a document of record providing such information as required by statute, the statute serves to both protect subsequent takers by eliminating their duty of inquiry to ascertain the nature and effect of a trust relationship and prevent undisclosed beneficiaries from contesting the interest of subsequent takers who obtained the property from the trustee or through the trustee's chain of title.[FN5] Further, a document purporting to be a trust will fail for lack of designated beneficiaries.[FN6]

[FN1] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN2] Iowa—Vogt v. Miller, 285 N.W.2d 1 (Iowa 1979).

N.J.—Coles v. Osback, 13 N.J. Super. 367, 80 A.2d 464 (Ch. Div. 1951), judgment rev'd on other grounds, 22 N.J. Super. 358, 92 A.2d 35 (App. Div. 1952).

As to time of making memoranda of contracts within statute of frauds, generally, see C.J.S., Frauds, Statute of § 110.

[FN3] Ill.—Albert v. Albert, 334 Ill. App. 440, 80 N.E.2d 69 (1st Dist. 1948).

N.J.—Coles v. Osback, 13 N.J. Super. 367, 80 A.2d 464 (Ch. Div. 1951), judgment rev'd on other grounds, 22 N.J. Super. 358, 92 A.2d 35 (App. Div. 1952).

[FN4] Ohio—Gammarino v. Hamilton Cty. Bd. of Revision, 84 Ohio St. 3d 155, 1998-Ohio-715, 702 N.E.2d 415 (1998).

[FN5] Colo.—Lagae v. Lackner, 996 P.2d 1281 (Colo. 2000).

[FN6] Ark.—Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 (1992).

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§ 35. Nature and form

West's Key Number Digest

West's Key Number Digest, Trusts 🔑17(1), 20, 21(1), 21(2)

The statute of frauds may be satisfied by any writing or writings, however informal, which sufficiently manifest or acknowledge the existence of the trust and disclose its nature, subject, purpose, and terms with certainty.

Insofar as the statute of frauds has been construed as not requiring the trust to be declared in writing, but as requiring merely that there be some written evidence manifesting the existence of the trust,[FN1] the courts, although strict in interpreting the statute of frauds to require some writing, are liberal in their construction as to the kind of writing required. The statute is satisfied by any writing, however informal, which sufficiently manifests or acknowledges the existence of the trust[FN2] and discloses its nature, subject, purpose, and terms.[FN3] A subsequent writing that sufficiently memorializes an oral trust and is signed by the trustee while the trustee holds title to the property satisfies the statute of frauds.[FN4] A proper document is sufficient to satisfy the statute of frauds only if it sets forth with reasonable definiteness the trust property, the beneficiaries, and the purposes of the trust.[FN5] While some courts have held that the writing must contain within itself, and without the aid of parol evidence, all that is necessary to enable the court to declare a trust,[FN6] other courts have held that the writings, in being considered for the purpose of satisfying the statute of frauds, are to be considered in their setting.[FN7] Moreover, the writing need not contain the words "trust" or "in trust."[FN8]

The statute of frauds is satisfied by a large variety of writings, such as accounts,[FN9] memoranda,[FN10] assignments, bonds, receipts, notes and mortgages,[FN11] and written agreements.[FN12] Letters and correspondence may constitute sufficient memoranda to satisfy the statute of frauds,[FN13] but a letter is insufficient where it does not clearly show an in-

tention to create a trust and the terms thereof[FN14] or where the statement of the terms or subject matter is not sufficient.[FN15] A trust may not be sufficiently manifested by an invalid will[FN16] although a will declaring that land devised to the testator's husband was held by her in trust for him was a sufficient declaration of trust even though invalid as a will.[FN17] The purpose of a statute requiring a personal representative's deed to list the beneficiaries of a trust or reference a document of record providing such information when conveying property to a grantee "as trustee" is to allow third parties to rely on the trustee's actions in connection with the trust property, without having to determine whether the trustee is or is not complying with his or her fiduciary duty to the trust beneficiaries.[FN18]

A trust is sufficiently declared and manifested by an admission or acknowledgment by the trustee that he or she holds in trust, contained in a pleading[FN19] or complaint.[FN20]

[FN1] § 27.

[FN2] Ala.—First Alabama Bank of Tuscaloosa, N.A. v. Webb, 373 So. 2d 631, 7 A.L.R.4th 610 (Ala. 1979).

N.Y.—In re Barker's Estate, 82 Misc. 2d 974, 370 N.Y.S.2d 404 (Sur. Ct. 1975).

Wash.—Grandy v. Luther, 12 Wash. App. 542, 530 P.2d 679 (Div. 1 1975).

As to nature, form, and contents of writing to satisfy statute of frauds, generally, see C.J.S., Frauds, Statute of §§ 114 to 139.

[FN3] Ill.—Johnson v. Bondy, 89 Ill. App. 2d 149, 232 N.E.2d 176 (1st Dist. 1967).

Mass.—Com. v. Nearis, 6 Mass. App. Ct. 854, 373 N.E.2d 1194 (1978).

N.J.—Matter of Kovalyshyn's Estate, 136 N.J. Super. 40, 343 A.2d 852 (County Ct., P. Div. 1975).

Essential elements to be stated

Kan.—In re Ingram's Estate, 212 Kan. 218, 510 P.2d 597 (1973).

[FN4] Neb.—Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

[FN5] Neb.—Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

[FN6] Pa.—Jourdan v. Andrews, 258 Pa. 347, 102 A. 33 (1917).

[FN7] Ind.—Ross v. Thompson, 128 Ind. App. 89, 146 N.E.2d 259 (1957).

[FN8] U.S.—Sadwith v. Lantry, 219 F. Supp. 171 (S.D. N.Y. 1963).

Mich.—Knights of Equity Memorial Scholarships Commission v. University of De-

troit, 359 Mich. 235, 102 N.W.2d 463 (1960).

Wyo.—Edmonds v. Galey, 458 P.2d 650 (Wyo. 1969).

[FN9] Mich.—Innis v. Michigan Trust Co., 238 Mich. 282, 213 N.W. 85 (1927).

[FN10] Neb.—Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

[FN11] Mich.—Innis v. Michigan Trust Co., 238 Mich. 282, 213 N.W. 85 (1927).

[FN12] U.S.—Sadler v. Sadler, 167 F.2d 1 (C.C.A. 9th Cir. 1948).

[FN13] Cal.—Hillman v. Stults, 263 Cal. App. 2d 848, 70 Cal. Rptr. 295 (2d Dist. 1968).

Tex.—Kurtz v. Robinson, 279 S.W.2d 949 (Tex. Civ. App. Amarillo 1955), writ refused n.r.e., (July 20, 1955).

Distribution of proceeds of sale of trust property

Letter written by mother that required daughter, to whom she was transferring title to her home, to distribute the proceeds from any sale of the property equally among the siblings satisfied the requirements of a writing in statute of frauds to create a valid trust, where letter was executed by mother prior to delivery of the deed to daughter.

Iowa—Orud v. Groth, 708 N.W.2d 72 (Iowa 2006).

[FN14] Ill.—Kraft v. Kretchman, 17 Ill. 2d 71, 160 N.E.2d 806 (1959).

[FN15] Tex.—Starr v. Ripley, 265 S.W.2d 225 (Tex. Civ. App. Austin 1954).

[FN16] Ill.—Phelps v. La Moille, Illinois, Lodge No. 270, A. F. and A. M., 52 Ill. App. 2d 164, 201 N.E.2d 634 (3d Dist. 1964).

[FN17] Mich.—Innis v. Michigan Trust Co., 238 Mich. 282, 213 N.W. 85 (1927).

[FN18] Colo.—Lagae v. Lackner, 996 P.2d 1281 (Colo. 2000).

[FN19] N.J.—Lach v. Weber, 123 N.J. Eq. 303, 197 A. 417 (Ch. 1938).

[FN20] Vt.—Miele v. Miele, 124 Vt. 110, 197 A.2d 787 (1964).

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§ 36. Execution

West's Key Number Digest

West's Key Number Digest, Trusts 🔑22

Although the writing in order to satisfy the statute of frauds must generally be signed by the proper party, it is ordinarily not required to be sealed or acknowledged.

In general, a deed or declaration of trust need not be under seal[FN1] or acknowledged,[FN2] unless the statute so requires.[FN3] Certainly as between the parties to the transaction, an instrument creating an express trust is valid and enforceable without acknowledgment.[FN4] Where there is no statute of frauds specifically relating to trusts, a declaration of trust made simultaneously with the acceptance of a legal title, although not embodied therein, does not require formal execution or acknowledgment in the absence of statute.[FN5]

On the other hand, the different statutes of frauds generally require the writing to be signed[FN6] by the proper party.[FN7] Hence, an unsigned trust agreement is not effective under a statute of frauds without the signature of the party enabled to declare a trust where the trust agreement had been written six years before the death of such party but the party had refused to sign it.[FN8] The signature of the trustee is sufficient without that of the beneficiary,[FN9] as is the signature of the declarant without those of the beneficiaries.[FN10]

Where the terms of a trust are collected from several writings, it is not necessary that all of them be signed if they are so connected with the one that is signed that they may be identified as parts of the transaction.[FN11]

[FN1] Mass.—Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748, 168 A.L.R. 1321 (1946).

As to requirements of execution of writing as to contracts within statute of frauds, generally, see C.J.S., Frauds, Statute of §§ 112, 140 to 153.

[FN2] Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

[FN3] Miss.—Board of Trustees of M.E. Church South v. Odom, 100 Miss. 64, 56 So. 314 (1911).

Not involving real estate

Fla.—Castellano v. Cosgrove, 280 So. 2d 676 (Fla. 1973).

[FN4] U.S.—Hudson v. Jones, 22 F. Supp. 938 (W.D. Okla. 1938).

Okla.—Kimberly v. Cissna, 1932 OK 831, 161 Okla. 17, 16 P.2d 1090 (1932).

[FN5] N.C.—Peele v. LeRoy, 222 N.C. 123, 22 S.E.2d 244 (1942).

[FN6] Cal.—Hillman v. Stults, 263 Cal. App. 2d 848, 70 Cal. Rptr. 295 (2d Dist. 1968).

Or.—Devereaux v. Cockerline, 179 Or. 229, 170 P.2d 727 (1946).

[FN7] Md.—O'Connor v. Estevez, 182 Md. 541, 35 A.2d 148 (1943).

Time of signing

Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

[FN8] Ark.—Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 (1992).

[FN9] U.S.—Sadler v. Sadler, 167 F.2d 1 (C.C.A. 9th Cir. 1948).

[FN10] N.J.—Lach v. Weber, 123 N.J. Eq. 303, 197 A. 417 (Ch. 1938).

[FN11] Ill.—Wynekoop v. Wynekoop, 407 Ill. 219, 95 N.E.2d 457 (1950).

Compliance held sufficient

Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

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§ 37. Recording and registration

West's Key Number Digest

West's Key Number Digest, Trusts 23

While the recording of written declarations of trust may be required, the failure to record does not ordinarily invalidate the instrument as between the parties.

Under some statutes to that effect, the recording of written declarations of trust is permissible or even required.[FN1] However, generally, the failure to have a deed or other declaration of trust put on record does not render it void or inoperative as between the parties.[FN2]

An unrecorded document executed on the same day as a trust instrument, by which the settlor waived any right to an accounting, past, present, and future, and which expressly referred to the trust instrument, is part of the trust, and thus, the trustee owes no duty of accounting to the beneficiaries of the trust.[FN3]

[FN1] Fla.—In re Herskowitz's Estate, 338 So. 2d 210 (Fla. Dist. Ct. App. 3d Dist. 1976).

Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

[FN2] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Miss.—Thames v. Holcomb, 230 Miss. 387, 92 So. 2d 548 (1957).

[FN3] Miss.—In re Jane W. Stubbs-Kelley Trust, 573 So. 2d 734 (Miss. 1990).

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A. Express Trusts
3. Declaration of Trust
a. In General

Topic Summary References Correlation Table

§ 38. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑25, 25(1)

A sufficient declaration of trust is essential to the creation of express or voluntary trusts, which generally are created by an instrument or instruments pointing out directly and expressly the property, persons, and purpose of the trust, or by an agreement or contract expressing the intended trust.

A declaration of trust is a conveyance of an equitable interest.[FN1] To prove the existence of a trust, a declaration creating the trust must be shown.[FN2] A sufficient declaration of trust is essential to the creation of an express or voluntary trust,[FN3] which, when the statute so requires, must be in writing.[FN4] Such trusts are generally created by an instrument or instruments pointing out directly and expressly the property, persons, and purpose of the trust,[FN5] or by an agreement or contract between the parties expressing the intended trust.[FN6] The declaration must contain sufficient words to create the trust,[FN7] and it must embody all the essential elements of a trust.[FN8] It must express the intention to create a trust[FN9] and state with certainty the terms,[FN10] subject,[FN11] persons,[FN12] and object[FN13] of the trust. The trustee must be authorized and directed to perform certain duties and assume certain obligations.[FN14] A trust, whether of real or personal property, is created as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty an intention on the part of the trustor to create a trust and the subject, purpose, and beneficiary of the trust.[FN15]

The declaration must set forth the purposes of the trust.[FN16] There is, however, no requirement that the settlor set forth his or her purpose in detail or explain the use of the trust as the vehicle of the transfer instead of some other mode.[FN17]

Where the creator of the trust selects himself or herself as trustee, a mere declaration to that effect is sufficient.[FN18] Some courts have held, however, that in order for one to constitute himself or herself a trustee of his or her own property, there should be some words of a conveyance, some expression of an intention to become trustee.[FN19]

The failure of a trust instrument to contain a penalty provision for a breach or forfeiture of the trust by the trustees will not invalidate the trust instrument.[FN20] Moreover, an express provision for the termination of the trust is not required.[FN21]

[FN1] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN2] S.C.—Foster v. Foster, 384 S.C. 380, 682 S.E.2d 312 (Ct. App. 2009).

[FN3] U.S.—Oak Woods Cemetery Ass'n v. U.S., 345 F.2d 361 (7th Cir. 1965).

Mich.—Osius v. Dingell, 375 Mich. 605, 134 N.W.2d 657 (1965).

N.C.—Young Women's Christian Ass'n of Ashville, N. C., Inc. v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Trust held not created

Ga.—Wilcox County School Dist. v. Sutton, 265 Ga. 720, 461 S.E.2d 868, 103 Ed. Law Rep. 853 (1995).

[FN4] §§ 27 to 33.

[FN5] U.S.—Logan Planing Mill Co. v. Fidelity & Cas. Co. of New York, 212 F. Supp. 906 (S.D. W. Va. 1962).

Tex.—Golob v. Stone, 262 S.W.2d 536 (Tex. Civ. App. Texarkana 1953).

As to transactions and agreements raising express trusts, see §§ 50 to 61.

[FN6] Mo.—Stevens v. Fitzpatrick, 218 Mo. 708, 118 S.W. 51 (1909).

[FN7] N.Y.—National Ins. & Guarantee Corp. Limited v. Vander Veer, 66 Misc. 2d 862, 322 N.Y.S.2d 293 (Sup 1971).

Tex.—Kagan v. Moody, 309 S.W.2d 515 (Tex. Civ. App. Houston 1957), writ refused n.r.e.

[FN8] Mo.—Bank of Perryville v. Kutz, 276 S.W.2d 593 (Mo. Ct. App. 1955).

Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 359 Pa. 1, 58 A.2d 23 (1948).

[FN9] §§ 43 to 45.

[FN10] Cal.—Nicholas v. Nicholas, 110 Cal. App. 2d 349, 242 P.2d 679 (2d Dist. 1952).

Pa.—Gribbel v. Gribbel, 341 Pa. 11, 17 A.2d 892 (1941).

[FN11] Mo.—Bank of Perryville v. Kutz, 276 S.W.2d 593 (Mo. Ct. App. 1955).

Tex.—Gonzalez v. Gonzalez, 457 S.W.2d 440 (Tex. Civ. App. Corpus Christi 1970), writ refused n.r.e., (Dec. 9, 1970).

[FN12] N.Y.—Flack v. Prudential Ins. Co. of America, 42 Misc. 2d 512, 248 N.Y.S.2d 323 (Sup 1964).

Tex.—Gonzalez v. Gonzalez, 457 S.W.2d 440 (Tex. Civ. App. Corpus Christi 1970), writ refused n.r.e., (Dec. 9, 1970).

[FN13] U.S.—Jackman v. Equitable Life Assur. Soc. of U. S., 145 F.2d 945 (C.C.A. 3d Cir. 1944).

Pa.—Pugh v. Gaines, 156 Pa. Super. 613, 41 A.2d 287 (1945).

[FN14] N.Y.—In re Johnson's Will, 33 Misc. 2d 643, 227 N.Y.S.2d 384 (Sur. Ct. 1962).

Tex.—Unthank v. Rippstein, 386 S.W.2d 134 (Tex. 1964).

[FN15] Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

Tex.—Gonzalez v. Gonzalez, 457 S.W.2d 440 (Tex. Civ. App. Corpus Christi 1970), writ refused n.r.e., (Dec. 9, 1970).

[FN16] Mo.—Bank of Perryville v. Kutz, 276 S.W.2d 593 (Mo. Ct. App. 1955).

Tex.—Gonzalez v. Gonzalez, 457 S.W.2d 440 (Tex. Civ. App. Corpus Christi 1970), writ refused n.r.e., (Dec. 9, 1970).

Certainty as to essential purposes sufficient

Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

[FN17] U.S.—Helfrich's Estate v. C I R, 143 F.2d 43 (C.C.A. 7th Cir. 1944).

[FN18] Ohio—Richmond v. Hallock, 11 Ohio Op. 2d 67, 81 Ohio L. Abs. 214, 158 N.E.2d 914 (C.P. 1956).

As to settlor constituting himself or herself trustee, generally, see § 53.

[FN19] Mo.—State ex rel. Union Nat. Bank of Springfield v. Blair, 350 Mo. 622, 166 S.W.2d 1085 (1942).

Vt.—Methodist Church of Sandgate v. First Nat. Bank of North Bennington, 125 Vt. 124, 211 A.2d 168 (1965).

[FN20] Kan.—Fry v. McCormick, 170 Kan. 741, 228 P.2d 727 (1951).

[FN21] Wis.—Wyse v. Puchner, 260 Wis. 365, 51 N.W.2d 38 (1952).

As to duration and termination of express trusts, generally, see §§ 113 to 121.

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§ 39. Spendthrift trusts

West's Key Number Digest

West's Key Number Digest, Trusts ⚷24, 28

In order that a spendthrift trust may be created, the declaration of trust must manifest a clear and undoubted intention by the creator or settlor to create such a trust.

Generally, to create a spendthrift trust, the trust agreement must simply include a spendthrift clause.[FN1] Express language is not necessary to create such a trust,[FN2] nor is any set phraseology or technical or particular form of words required.[FN3] It is sufficient if by the terms of the trust that the settlor manifests an intention to impose the restrictions common to such trust.[FN4] The creator of a spendthrift trust need only manifest the intention, either expressly or impliedly in the instrument creating the trust, that the beneficiaries shall be entitled to their equitable interests in the trust property, free from the claims of their creditors.[FN5]

The declaration need not denominate the beneficiary a spendthrift,[FN6] give reasons for creating the trust,[FN7] contain all restrictions and qualifications incident to such a trust,[FN8] express specific restraints on alienation and anticipation,[FN9] or expressly declare that the interest of the beneficiary shall be beyond the reach of creditors.[FN10] It is sufficient if the intention is reasonably plain on a consideration of the instrument as a whole.[FN11]

Under some statutes, a spendthrift trust must be declared by will or deed[FN12] and must be duly recorded.[FN13]

[FN1] Minn.—Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998).

[FN2] Ohio—Adair v. Sharp, 49 Ohio App. 507, 3 Ohio Op. 369, 18 Ohio L. Abs. 123, 197 N.E. 399 (2d Dist. Franklin County 1934).

[FN3] Minn.—Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998).

Tex.—Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. Texarkana 1952), writ refused n.r.e.

[FN4] Minn.—Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998).

[FN5] Md.—Duvall v. McGee, 375 Md. 476, 826 A.2d 416 (2003).

[FN6] Ill.—Mohler v. Wesner, 382 Ill. 225, 47 N.E.2d 64 (1943).

Utah—Cronquist v. Utah State Agr. College, 114 Utah 426, 201 P.2d 280 (1949).

[FN7] Ill.—Mohler v. Wesner, 382 Ill. 225, 47 N.E.2d 64 (1943).

Tex.—Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App. Fort Worth 1958).

[FN8] Cal.—In re De Lano's Estate, 62 Cal. App. 2d 808, 145 P.2d 672 (2d Dist. 1944).

Ill.—Mohler v. Wesner, 382 Ill. 225, 47 N.E.2d 64 (1943).

[FN9] Utah—Cronquist v. Utah State Agr. College, 114 Utah 426, 201 P.2d 280 (1949).

[FN10] Ohio—Adair v. Sharp, 49 Ohio App. 507, 3 Ohio Op. 369, 18 Ohio L. Abs. 123, 197 N.E. 399 (2d Dist. Franklin County 1934).

[FN11] Minn.—In re Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 (1951).

Utah—Cronquist v. Utah State Agr. College, 114 Utah 426, 201 P.2d 280 (1949).

[FN12] Tenn.—State ex rel. v. Nashville Trust Co., 28 Tenn. App. 388, 190 S.W.2d 785 (1944).

[FN13] § 37.

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§ 40. Reservations and conditions

West's Key Number Digest

West's Key Number Digest, Trusts 🔑25(3)

In a proper case, the settlor in an express or voluntary trust may reserve to himself or herself various rights and powers, without invalidating the trust.

The fact that the settlor, in creating the trust, makes certain reservations, does not in itself affect the validity of the declaration.[FN1] Thus, in a proper case, he or she may, without invalidating the trust, reserve an estate or interest in the trust property.[FN2] The settlor may reserve to himself or herself a beneficial interest in the property for the settlor's life,[FN3] such as a reservation of a life income from the subject matter of the trust,[FN4] and such does not so defeat the settlor's parting with the dominion over the trust property as to entitle his widow to assert a right to a distributive share of the trust estate.[FN5] Alternatively, the settlor may reserve the right to use or consume[FN6] or dispose of[FN7] the corpus, such as a power of appointment over the principal,[FN8] or the power to borrow money on the trust res,[FN9] or to withdraw all or any part of the trust estate.[FN10] The settlor may also reserve the power to sell, assign, transfer, set over, and deliver the property,[FN11] or the power to manage, control, or supervise the trust property,[FN12] or to control investments,[FN13] or to substitute a new trustee.[FN14] Additionally, the settlor may reserve extensive powers to over the administration of the trust[FN15] and to modify or revoke the trust[FN16] or to revoke a gift to a beneficiary.[FN17] A settlor may even reserve the power to access the trust assets without the formal authorization of a trustee, as long as the intention to create the trust is evidenced by a signed document, the trust property is clearly specified and transferred into the trust, vested interests are created in the beneficiaries, and the trust document plainly enunciates the essential terms of the trust.[FN18]

Generally, such reservations are construed to be conditions subsequent.[FN19] The fact

that there may be no portion of the trust property left for the beneficiaries to receive, by reason of the settlor's exercise of his or her reserved right to use or dispose of it, does not render the declaration invalid.[FN20]

Where, however, the settlor retains powers which in their cumulative effect amount to ownership of the trust estate with such control over the administrative functions of the trustee as to make of him or her simply the settlor's agent or representative, no trust is established.[FN21] In determining whether the powers reserved by the settlor are so great as to negate an intent to create any present interest in the beneficiaries, factors to be considered are the formality of the transaction[FN22] and the combination of reservations.[FN23] For the purpose of determining the validity of a trust, the interest of a beneficiary other than the grantor suffices if it is a contingent equitable remainder.[FN24]

A settlor may validly impose conditions on the use of the trust property after his or her death.[FN25] A declaration of trust, to take effect on the happening of certain conditions, does not become operative if such conditions never occur.[FN26]

[FN1] Kan.—Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973).

Tex.—Westerfeld v. Huckaby, 474 S.W.2d 189 (Tex. 1971).

As to retention of possession and control of trust res by donor as not affecting validity of trust, see § 68.

[FN2] U.S.—Hopkins v. Commissioner of Internal Revenue, 144 F.2d 683, 29 Ohio Op. 347, 158 A.L.R. 1301 (C.C.A. 6th Cir. 1944).

W.Va.—Ray v. Frick Co., 133 W. Va. 715, 57 S.E.2d 890 (1950).

[FN3] N.Y.—In re Gould's Trust, 34 Misc. 2d 58, 227 N.Y.S.2d 128 (Sup 1962).

[FN4] Kan.—In re Ingram's Estate, 212 Kan. 218, 510 P.2d 597 (1973).

Mo.—Gardner v. Bernard, 401 S.W.2d 415 (Mo. 1966).

[FN5] Ohio—Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 18 Ohio Op. 2d 42, 179 N.E.2d 60 (1961).

[FN6] U.S.—Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2 of Grant County, Wash., 237 F. Supp. 985 (S.D. N.Y. 1965).

Mass.—Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748, 168 A.L.R. 1321 (1946).

[FN7] U.S.—Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2 of Grant County, Wash., 237 F. Supp. 985 (S.D. N.Y. 1965).

[FN8] Del.—Lewis v. Hanson, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

N.Y.—Application of Central Hanover Bank & Trust Co. (Momand), 176 Misc. 183, 26 N.Y.S.2d 924 (Sup 1941), judgment aff'd, 263 A.D. 801, 32 N.Y.S.2d 128 (1st Dep't 1941), order aff'd, 288 N.Y. 608, 42 N.E.2d 610 (1942).

[FN9] Mich.—Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942).

[FN10] U.S.—Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2 of Grant County, Wash., 237 F. Supp. 985 (S.D. N.Y. 1965).

Reservation in grantor as exclusion of right in another

Terms of trust prohibited grantor's appointed attorney-in-fact from amending trust during grantor's lifetime to delete stock that grantor had placed in trust; trust expressly reserved the rights to amend or withdraw assets from trust to grantor, and one provision of trust further prohibited any "conservator," "guardian," or "any other person" from exercising those rights during grantor's lifetime.

Fla.—Gurfinkel v. Josi, 972 So. 2d 927 (Fla. Dist. Ct. App. 3d Dist. 2007).

Power to access trust assets

Utah—Matter of Estate of Groesbeck, 935 P.2d 1255 (Utah 1997) (disapproved of on other grounds by, Hoggan v. Hoggan, 2007 UT 78, 169 P.3d 750 (Utah 2007)).

[FN11] Fla.—Lane v. Palmer First Nat. Bank & Trust Co. of Sarasota, 213 So. 2d 301 (Fla. Dist. Ct. App. 2d Dist. 1968).

[FN12] Fla.—Lane v. Palmer First Nat. Bank & Trust Co. of Sarasota, 213 So. 2d 301 (Fla. Dist. Ct. App. 2d Dist. 1968).

N.Y.—In re Gould's Trust, 34 Misc. 2d 58, 227 N.Y.S.2d 128 (Sup 1962).

[FN13] Conn.—DiSesa v. Hickey, 160 Conn. 250, 278 A.2d 785 (1971).

[FN14] Mich.—Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942).

[FN15] Conn.—Swiconek v. Zoning Bd. of Appeals of Town of Glastonbury, 51 Conn. Supp. 190, 978 A.2d 1174 (Super. Ct. 2009).

[FN16] §§ 93 to 112.

[FN17] Fla.—Lane v. Palmer First Nat. Bank & Trust Co. of Sarasota, 213 So. 2d 301 (Fla. Dist. Ct. App. 2d Dist. 1968).

Tex.—Westerfeld v. Huckaby, 474 S.W.2d 189 (Tex. 1971).

[FN18] Utah—Matter of Estate of Groesbeck, 935 P.2d 1255 (Utah 1997) (disapproved of on other grounds by, Hoggan v. Hoggan, 2007 UT 78, 169 P.3d 750 (Utah 2007)).

[FN19] U.S.—United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946).

[FN20] Mich.—Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942).

[FN21] N.Y.—In re Ford's Estate, 279 A.D. 152, 108 N.Y.S.2d 122 (1st Dep't 1951), order aff'd, 304 N.Y. 598, 107 N.E.2d 87 (1952).

[FN22] U.S.—United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946).

[FN23] Mich.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 270 Mich. 222, 258 N.W. 253 (1935).

[FN24] Utah—Matter of Estate of Groesbeck, 935 P.2d 1255 (Utah 1997) (disapproved of on other grounds by, Hoggan v. Hoggan, 2007 UT 78, 169 P.3d 750 (Utah 2007)).

[FN25] N.Y.—Glaser v. Glaser, 19 A.D.2d 354, 243 N.Y.S.2d 348 (1st Dep't 1963), order aff'd, 14 N.Y.2d 895, 252 N.Y.S.2d 93, 200 N.E.2d 776 (1964).

[FN26] N.Y.—In re Wahl's Will, 1 A.D.2d 666, 146 N.Y.S.2d 534 (1st Dep't 1955).

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§ 41. Use of several instruments

West's Key Number Digest

West's Key Number Digest, Trusts 🔑21(1)

Generally, to determine if a trust has been created, multiple writings may be considered, though not all writings will qualify for consideration.

Generally, to determine if a trust has been created, multiple writings may be considered,[FN1] though not all writings will qualify for consideration.[FN2]

It is not necessary that the declaration of trust be contained in, or endorsed on, the instrument which transfers the legal title to the property[FN3] or, where the property is described in the conveyance, that it be described in the declaration of trust.[FN4] Although it has been held that the declaration of a trust must be contemporaneous with a deed,[FN5] it has also been held that the writings need not be contemporaneous.[FN6] A trust declaration resting on a contemporaneously executed void deed is void.[FN7]

The declaration of trust need not be contained in the instrument which transfers the legal title but may be set out in a separate instrument[FN8] or in several papers or instruments, provided that they are related to, and connected with, each other and, when construed together, evidence the existence of a trust.[FN9] Moreover, where a note is validly created under a trust's amendatory procedures and attached to the trust amendment, it is not a separate instrument that requires incorporation by reference to be valid.[FN10] However, two documents cannot be collectively considered to determine if a trust had been created where the first signed document is the minutes of meeting and do not incorporate the second unsigned document, a trust agreement, by direct statement.[FN11]

[FN1] Cal.—Weiner v. Mullaney, 59 Cal. App. 2d 620, 140 P.2d 704 (2d Dist. 1943).

Mo.—Stephenson v. Stephenson, 351 Mo. 8, 171 S.W.2d 565 (1943).

As to use of several instruments as sufficient to satisfy requirement that declarations of trust be in writing, see § 35.

[FN2] Ark.—Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 (1992).

[FN3] Ind.—Ross v. Thompson, 128 Ind. App. 89, 146 N.E.2d 259 (1957).

[FN4] Mont.—Hodgkiss v. Northland Petroleum Consol., 104 Mont. 328, 67 P.2d 811 (1937).

[FN5] Ohio—Petyak v. Petyak, 56 Ohio L. Abs. 353, 92 N.E.2d 412 (Ct. App. 7th Dist. Mahoning County 1949).

[FN6] Mo.—Stephenson v. Stephenson, 351 Mo. 8, 171 S.W.2d 565 (1943).

[FN7] Ill.—Hess v. Gilbert, 333 Ill. App. 330, 77 N.E.2d 536 (1st Dist. 1948).

[FN8] Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

[FN9] Cal.—Weiner v. Mullaney, 59 Cal. App. 2d 620, 140 P.2d 704 (2d Dist. 1943).

Ill.—Wynekoop v. Wynekoop, 407 Ill. 219, 95 N.E.2d 457 (1950).

As to declaration of trust by means of several writings, generally, see § 41.

[FN10] Idaho—Matter of Estate of Kirk, 127 Idaho 817, 907 P.2d 794 (1995).

[FN11] Ark.—Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 (1992).

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§ 42. Construction

West's Key Number Digest

West's Key Number Digest, Trusts ⚷19.1

The construction of a declaration of trust is a matter of law and should be based on a consideration of the whole instrument or instruments and the facts and circumstances of the case and should give effect to the intent of the parties.

The construction of a declaration or acknowledgment of trust is a matter of law.[FN1]

Whether a trust is declared by a particular instrument depends on the construction to be placed on that instrument[FN2] which, where it is clear and unambiguous, is deduced from the language thereof.[FN3] Regard will be had to the provisions of the instrument as expressed,[FN4] and the instrument or instruments will be considered in the light of the surrounding facts and circumstances.[FN5] Whether a trust relationship arises from a particular transaction is to be determined from a written agreement entered into, plus the acts and declarations of the parties.[FN6]

The whole instrument is to be considered[FN7] and its various parts compared.[FN8] Where there are several instruments or writings, they are to be considered and taken together.[FN9] Words are to be construed according to their natural meaning.[FN10] In determining whether or not a writing creates an express trust, the court is not permitted to speculate, guess, or surmise as to the meaning of the instruments and relationship of the parties.[FN11]

Where an intention to create a trust is manifest, that intention should not be nullified by construction if there is any way in which it can be sustained.[FN12] Where construction is necessary, the practical interpretation given the declaration by the parties themselves is entitled to great weight.[FN13] However, an instrument may be construed as creating a trust, although it expressly states it is not to be so construed.[FN14]

[FN1] U.S.—Schneider v. Murphy, 183 F.2d 777 (5th Cir. 1950).

[FN2] Tex.—Clark v. Wisdom, 403 S.W.2d 877 (Tex. Civ. App. Corpus Christi 1966), writ refused n.r.e., (Oct. 5, 1966).

[FN3] Del.—Hanson v. Wilmington Trust Co., 35 Del. Ch. 411, 119 A.2d 901 (1955), judgment aff'd, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[FN4] Neb.—O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507 (1949).

[FN5] Mich.—Knights of Equity Memorial Scholarships Commission v. University of Detroit, 359 Mich. 235, 102 N.W.2d 463 (1960).

[FN6] Cal.—People v. Pierce, 110 Cal. App. 2d 598, 243 P.2d 585 (2d Dist. 1952).

[FN7] La.—St. Charles Land Trust, Achille Guibet v. St. Amant, 253 La. 243, 217 So. 2d 385 (1968).

N.Y.—In re Schwedler's Trust, 113 N.Y.S.2d 306 (Sup 1952).

[FN8] Wash.—Hoffman v. Tieton View Community M.E. Church, 33 Wash. 2d 716, 207 P.2d 699 (1949).

[FN9] Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, 190 S.W.2d 636 (Mo. Ct. App. 1945).

[FN10] Pa.—Brubaker v. Lauver, 322 Pa. 461, 185 A. 848 (1936).

[FN11] U.S.—U.S. v. Certain Land in Wayne County, Mo., Known as Tract No. 8, Mingo Nat. Wildlife Refuge Project, 70 F. Supp. 730 (E.D. Mo. 1947).

[FN12] Mo.—St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962).

[FN13] Cal.—Eggert v. Pacific States Savings & Loan Co., 57 Cal. App. 2d 239, 136 P.2d 822 (2d Dist. 1943).

Neb.—O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507 (1949).

[FN14] U.S.—California & Hawaiian Sugar Refining Corp. v. C.I.R., 163 F.2d 531 (C.C.A. 9th Cir. 1947), applying California law.

Cal.—Neel v. Barnard, 24 Cal. 2d 406, 150 P.2d 177 (1944).

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§ 43. Generally

West's Key Number Digest

West's Key Number Digest, Trusts ⚿25 to 27

The declaration of trust must clearly manifest an intention to create a trust in order that an express or voluntary trust may be created.

A trust arises as a result of an intention to create the relationship.[FN1] In fact, an express trust arises only because the parties intended to create it.[FN2] For it to be valid, it must unequivocally show an intention that the legal estate be vested in one person to be held in some manner or for some purpose on behalf of another.[FN3] The settlor's intent to create the trust purportedly created by declaration may be established from the face of the instrument.[FN4] In other words, in order to create an express or voluntary trust, the declaration of trust must manifest an intention so to do by the settlor or transferor of the property.[FN5] The intention, in the absence of a statute providing otherwise, may properly be manifested by written or spoken words or by conduct[FN6] and the intention may be gathered from powers granted and duties imposed and from manifest purposes which cannot be accomplished except through a trust,[FN7] or from the relationship of the parties and acts affecting the title to, and possession of, the trust property.[FN8]

The intention to create a trust must be sufficiently expressed,[FN9] and the declaration of trust must show the intention with reasonable certainty.[FN10] It is necessary that there be a definite,[FN11] unequivocal,[FN12] explicit[FN13] declaration of trust, or circumstances which show with reasonable certainty[FN14] or beyond a reasonable doubt[FN15] that a trust was intended to be created. The expression of intention, however, is sufficient if the language used shows the intention to create a trust[FN16] even though the parties may not understand what a trust is.[FN17]

An expression of intent alone, however, is not enough to create a trust.[FN18] The intention must be accompanied by acts or steps bringing the trust into existence.[FN19] The intention shown must be an intention to create a trust at the present time,[FN20] and an expression of a mere intention or agreement to create a trust at some future time is insufficient.[FN21]

Spendthrift trusts.

In order that a spendthrift trust may be created, the declaration must manifest a clear and undoubted intention by the creator or settlor to create such a trust.[FN22] The intention must appear in the instrument creating the trust[FN23] and can be determined by looking to the restrictions placed upon the trustee as to the distribution of income and principal to the beneficiaries of the trust.[FN24] In determining whether the settlor intended to create a spendthrift trust, the entire instrument must be considered, aided by the surrounding circumstances, due weight being given to all its language, with some meaning being given, if possible, to all parts, expressions, and words used, discarding and disregarding no parts as meaningless if any meaning can be given them consistently with the rest of the instrument.[FN25]

[FN1] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

Md.—From the Heart Church Ministries, Inc. v. Philadelphia-Baltimore Annual Conference, 184 Md. App. 11, 964 A.2d 215 (2009), cert. denied, 408 Md. 148, 968 A.2d 1064 (2009).

[FN2] Vt.—Savage v. Walker, 2009 VT 8, 969 A.2d 121 (Vt. 2009).

[FN3] Mass.—Ventura v. Ventura, 407 Mass. 724, 555 N.E.2d 872 (1990).

[FN4] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN5] Ill.—Kavanaugh v. Dobrowolski's Estate, 86 Ill. App. 3d 33, 41 Ill. Dec. 358, 407 N.E.2d 856 (1st Dist. 1980).

Okla.—Tulsa Exposition & Fair Corp. v. Board of County Com'rs of Tulsa County, 1970 OK 67, 468 P.2d 501 (Okla. 1970).

As to intention of owner constituting himself or herself a trustee, see § 53.

[FN6] U.S.—In re Dexter Buick-GMC Truck Co., 2 B.R. 247 (Bankr. D. R.I. 1980).

Colo.—Denver Chapter No. 145, Order of Ahepa v. Mile Hi City Chapter No. 360, 171 Colo. 541, 469 P.2d 740 (1970).

Okla.—C & C Tile Co., Inc. v. Independent School Dist. No. 7 of Tulsa County, 1972 OK 137, 503 P.2d 554 (Okla. 1972).

[FN7] N.J.—Kronisch v. Howard Sav. Inst., 154 N.J. Super. 576, 382 A.2d 64 (Ch. Div. 1977), judgment aff'd in part, rev'd in part on other grounds, 161 N.J. Super. 592,

392 A.2d 178 (App. Div. 1978).

Tex.—Hereford Land Co. v. Globe Industries, Inc., 387 S.W.2d 771 (Tex. Civ. App. Tyler 1965), writ refused n.r.e., (May 5, 1965).

[FN8] Ill.—LaThrop v. Bell Federal Sav. and Loan Ass'n, 42 Ill. App. 3d 183, 355 N.E.2d 667 (1st Dist. 1976), judgment aff'd, 68 Ill. 2d 375, 12 Ill. Dec. 565, 370 N.E.2d 188 (1977).

[FN9] Colo.—Gately v. El Paso County Bar Ass'n, 137 Colo. 599, 328 P.2d 381 (1958).

[FN10] Tex.—Rippstein v. Unthank, 380 S.W.2d 155 (Tex. Civ. App. Amarillo 1964), judgment rev'd on other grounds, 386 S.W.2d 134 (Tex. 1964).

[FN11] Fla.—Watson v. St. Petersburg Bank & Trust Co., 146 So. 2d 383 (Fla. Dist. Ct. App. 2d Dist. 1962).

Nev.—In re Foster's Estate, 82 Nev. 97, 411 P.2d 482 (1966).

[FN12] N.Y.—In re Schultz' Estate, 152 N.Y.S.2d 959 (Sur. Ct. 1956).

Tex.—Alexander v. Botsford, 439 S.W.2d 414 (Tex. Civ. App. Dallas 1969), writ refused n.r.e., (July 16, 1969).

[FN13] U.S.—Shiro v. Drew, 174 F. Supp. 495 (D. Me. 1959).

[FN14] Del.—Walsh v. St. Joseph's Home For Aged, 303 A.2d 691 (Del. Ch. 1973).

[FN15] N.Y.—In re Fontanella's Estate, 33 A.D.2d 29, 304 N.Y.S.2d 829 (3d Dep't 1969).

[FN16] U.S.—In re Penn Central Transp. Co., 486 F.2d 519 (3d Cir. 1973).

La.—St. Charles Land Trust, Achille Guibet v. St. Amant, 253 La. 243, 217 So. 2d 385 (1968).

Md.—Killen v. Houser, 239 Md. 79, 210 A.2d 527 (1965).

[FN17] Mo.—Masterson v. Plummer, 343 S.W.2d 352 (Mo. Ct. App. 1961).

Ohio—Gill v. Gill, 4 Ohio Misc. 141, 33 Ohio Op. 2d 211, 212 N.E.2d 83 (Prob. Ct. 1965).

[FN18] U.S.—Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2 of Grant County, Wash., 237 F. Supp. 985 (S.D. N.Y. 1965).

[FN19] N.C.—Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Ohio—Thomas v. Dye, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 2d Dist. Frank-

lin County 1954).

[FN20] Ky.—Compton v. Compton, 435 S.W.2d 76 (Ky. 1968).

[FN21] N.Y.—Payne v. Connelly, 32 A.D.2d 693, 299 N.Y.S.2d 1013 (3d Dep't 1969).

[FN22] Conn.—Hildreth Press Emp. Federal Credit Union v. Connecticut General Life Ins. Co., 30 Conn. Supp. 513, 295 A.2d 54 (C.P. App. Div. 1972).

As to presumption against creation of spendthrift trust, see § 72.

[FN23] Mo.—McNeal v. Bonnel, 412 S.W.2d 167 (Mo. 1967).

[FN24] Minn.—Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998).

[FN25] Minn.—Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998).

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§ 44. Necessity for particular formality or technical language

West's Key Number Digest

West's Key Number Digest, Trusts 🔑21

The mere form of the instrument, or the use or nonuse of particular or technical words, is not alone determinative of whether or not a trust was created, although the use of technical words is important and constitutes evidence of an intention to create a trust.

Formal or technical language is not required.[FN1] No special or particular words[FN2] or conduct[FN3] and no particular formality or form of words[FN4] is essential to the creation of a trust, as long as the intent is sufficiently expressed.[FN5] Express trusts may be recognized and enforced which have not been directly and expressly declared, but which are inferred from the circumstances by a construction of all the terms and dispositions.[FN6] A trust estate may be created by implication,[FN7] and definite[FN8] or express[FN9] words are not necessary.

Thus, it is not necessary to use the words "trust,"[FN10] "trustee,"[FN11] or other phraseology incorporating the word trust such as "trust fund"[FN12] or equivalent words,[FN13] and indeed, the mere use of the words "in trust" in an instrument[FN14] or other words of trusteeship[FN15] do not conclusively establish that the settlor intended to create a trust.[FN16] The creation of a trust, though, must otherwise be sufficiently evident.[FN17]

The use of formal or technical words, however, is important in determining whether or not a trust was intended,[FN18] and it is a circumstance to be considered in determining whether a trust was created.[FN19] The fact that such words are used is evidence of an intention to create a trust.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

Congress need not use any particular form of words in expressing its intent to create a statutory trust, and the absence of the words "trust" or "trustee" in the conveyance is not determinative of the question of whether Congress intended to create a trust, instead, the creation of a trust depends on whether the relevant statutory provision contains an enumeration of duties which would justify a conclusion that Congress intended to create a trust relationship. In re Arctic Exp. Inc., 636 F.3d 781 (6th Cir. 2011).

[END OF SUPPLEMENT]

[FN1] Del.—Walsh v. St. Joseph's Home For Aged, 303 A.2d 691 (Del. Ch. 1973).

Kan.—Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973).

[FN2] Kan.—Winsor v. Powell, 209 Kan. 292, 497 P.2d 292 (1972).

Mont.—Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 (1997).

[FN3] Mont.—Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 (1997).

[FN4] N.J.—Dierksen v. Albert, 106 N.J. Super. 220, 254 A.2d 809 (App. Div. 1969).

Or.—Andrews v. Hochmuth, 253 Or. 313, 454 P.2d 636 (1969).

As to transactions raising express trusts, see §§ 50 to 61.

[FN5] N.J.—Dierksen v. Albert, 106 N.J. Super. 220, 254 A.2d 809 (App. Div. 1969).

Vt.—Mahoney v. Leddy, 126 Vt. 98, 223 A.2d 456 (1966).

[FN6] U.S.—Stratford Financial Corp. v. Finex Corp., 367 F.2d 569 (2d Cir. 1966); In re Penn Central Transp. Co., 486 F.2d 519 (3d Cir. 1973).

[FN7] Ky.—Crawford v. Crawford, 290 Ky. 542, 162 S.W.2d 4 (1942).

[FN8] Cal.—Nicholas v. Nicholas, 110 Cal. App. 2d 349, 242 P.2d 679 (2d Dist. 1952).

[FN9] U.S.—Community Services, Inc. v. U. S., 191 Ct. Cl. 76, 422 F.2d 1353 (1970).

Cal.—Nicholas v. Nicholas, 110 Cal. App. 2d 349, 242 P.2d 679 (2d Dist. 1952).

[FN10] Ariz.—State ex rel. Goddard v. Coerver, 100 Ariz. 135, 412 P.2d 259 (1966).

Mo.—Gardner v. Bernard, 401 S.W.2d 415 (Mo. 1966).

Pa.—In re Thompson's Estate, 416 Pa. 249, 206 A.2d 21 (1965).

[FN11] U.S.—Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972).

Ariz.—State ex rel. Goddard v. Coerver, 100 Ariz. 135, 412 P.2d 259 (1966).

Mo.—Gardner v. Bernard, 401 S.W.2d 415 (Mo. 1966).

[FN12] Neb.—O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507 (1949).

[FN13] Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, 190 S.W.2d 636 (Mo. Ct. App. 1945).

[FN14] Haw.—Trust Created Under Will of Damon, 76 Haw. 120, 869 P.2d 1339 (1994).

N.Y.—In re Tobin's Estate, 113 N.Y.S.2d 831 (Sur. Ct. 1952).

[FN15] Cal.—Petherbridge v. Prudential Sav. & Loan Assn., 79 Cal. App. 3d 509, 145 Cal. Rptr. 87 (4th Dist. 1978).

Mont.—Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 (1997).

Wis.—In re Mueller Travel Agency, Inc., 56 Wis. 2d 207, 201 N.W.2d 589 (1972).

[FN16] Haw.—Trust Created Under Will of Damon, 76 Haw. 120, 869 P.2d 1339 (1994).

N.Y.—In re Tobin's Estate, 113 N.Y.S.2d 831 (Sur. Ct. 1952).

[FN17] Cal.—Placerville Fruit Growers' Ass'n v. Irving, 135 Cal. App. 2d 731, 287 P.2d 793 (3d Dist. 1955).

[FN18] Colo.—Gately v. El Paso County Bar Ass'n, 137 Colo. 599, 328 P.2d 381 (1958).

[FN19] Neb.—O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507 (1949).

[FN20] Neb.—O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W.2d 507 (1949).

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§ 45. Precatory words

West's Key Number Digest

West's Key Number Digest, Trusts ⚷29

Precatory or recommendatory words will be sufficient to create an express or voluntary trust where, and only where, it clearly appears that such was the intention of the donor or settlor and the trust is otherwise sufficiently declared.

Whether a trust will be found from the use of any precatory word or phrase, whether that be "desire," "wish," "hope," "recommend," "in confidence," or "rely," cannot be concluded merely from the particular word or phrase used.[FN1] Precatory or recommendatory words may or may not be sufficient to create an express or voluntary trust.[FN2] Each case must be considered separately, and whether or not a trust has been created by precatory words must be determined on the basis of the facts thereof and the guides and tests generally applicable in determining the force and effect of precatory words.[FN3] Such words will create a trust where, and only where, it clearly appears that such was the intention of the settlor.[FN4] Of themselves, such words are insufficient.[FN5] A mere expression of a wish is not enough.[FN6]

Precatory or recommendatory words will not be sufficient to create a trust where the donor shows an intention to leave the property absolutely.[FN7] Hence, a precatory trust will not be created where the writing imports a grant of absolute ownership to the donee and there are additional words expressing the donor's wish as to the use or disposition of the property.[FN8]

[FN1] Mont.—Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 (1997).

[FN2] Ky.—Bosworth v. Kilbourn, 304 Ky. 628, 201 S.W.2d 904 (1947).

As to precatory words as creating testamentary trust, see C.J.S., Wills § 1437.

[FN3] Ky.—Bosworth v. Kilbourn, 304 Ky. 628, 201 S.W.2d 904 (1947).

Mass.—Cooney v. Montana, 347 Mass. 29, 196 N.E.2d 202 (1964).

[FN4] U.S.—King v. Richardson, 136 F.2d 849 (C.C.A. 4th Cir. 1943).

Precatory words held not to create trust

Iowa—In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 (1967).

[FN5] Ariz.—Newhall v. McGill, 69 Ariz. 259, 212 P.2d 764 (1949).

Va.—McClure v. Carter, 202 Va. 191, 116 S.E.2d 260 (1960).

[FN6] Fla.—Magnant v. Peacock, 157 Fla. 271, 25 So. 2d 566 (1946).

[FN7] Colo.—Gately v. El Paso County Bar Ass'n, 137 Colo. 599, 328 P.2d 381 (1958).

[FN8] Colo.—Gately v. El Paso County Bar Ass'n, 137 Colo. 599, 328 P.2d 381 (1958).

Ky.—Bosworth v. Kilbourn, 304 Ky. 628, 201 S.W.2d 904 (1947).

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§ 46. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑21(2)

In order to constitute an express or voluntary trust, the declaration of trust must clearly set forth the essentials thereof and be reasonably certain in its material terms.

In order to constitute an express or voluntary trust, the essentials of a trust must appear clearly.[FN1] Clear, explicit, definite, unequivocal, and unambiguous language or conduct is required.[FN2] The declaration must be reasonably certain in its material terms and embody the essential elements of a trust,[FN3] so that a court may enforce its execution.[FN4]

If the language is so vague, general, or equivocal that any of the necessary elements of the trust are not described with certainty, a trust will not be created.[FN5] It cannot arise from loose statements admitting possible inferences consistent with other relationships.[FN6] It is not necessary, however, that the declaration express every element so clearly that nothing can be left to inference or implication,[FN7] it being sufficient if the donor's general intent and the objects thereof are ascertainable by the tribunal provided for that purpose.[FN8]

The requisite of certainty in the declaration of trust includes certainty as to the manner in which the trust is to be performed.[FN9] The rights and duties of the parties must be defined,[FN10] though the donor or settlor may leave the trustee a wide discretion as to the mode of realizing the end sought.[FN11] It is not necessary, however, that all the details of the management and execution of the trust be specified,[FN12] or that remote contingencies be provided against.[FN13] It is sufficient if the general scheme of the trust is made sufficiently clear that the proper court can judicially determine it and superintend the execution of the trust.[FN14]

[FN1] Colo.—Morgan v. Wright, 156 Colo. 411, 399 P.2d 788 (1965).

Ill.—In re Senesac, 17 Ill. App. 2d 290, 149 N.E.2d 452 (2d Dist. 1958).

[FN2] Colo.—Fleming and Pattridge v. Singer, 168 Colo. 195, 450 P.2d 635 (1969).

Tex.—Rippstein v. Unthank, 380 S.W.2d 155 (Tex. Civ. App. Amarillo 1964), judgment rev'd on other grounds, 386 S.W.2d 134 (Tex. 1964).

[FN3] Ind.—Pavy v. Peoples Bank & Trust Co., 135 Ind. App. 647, 195 N.E.2d 862 (1964).

Ohio—Gill v. Gill, 4 Ohio Misc. 141, 33 Ohio Op. 2d 211, 212 N.E.2d 83 (Prob. Ct. 1965).

[FN4] N.Y.—In re Michaels' Estate, 7 Misc. 2d 439, 165 N.Y.S.2d 234 (Sur. Ct. 1957).

[FN5] U.S.—Stone v. Stone, 460 F.2d 64 (4th Cir. 1972).

Mich.—Martin v. Martin, 37 Mich. App. 208, 194 N.W.2d 552 (1971).

Mo.—Pollock v. Brown, 569 S.W.2d 724 (Mo. 1978).

[FN6] U.S.—Leggett's Estate v. U. S., 418 F.2d 1257 (3d Cir. 1969).

[FN7] Ill.—Cazel v. Cazel, 22 Ill. 2d 339, 175 N.E.2d 403 (1961).

S.C.—Black v. Gettys, 238 S.C. 167, 119 S.E.2d 660 (1961).

[FN8] Ill.—Cazel v. Cazel, 22 Ill. 2d 339, 175 N.E.2d 403 (1961).

Ohio—Gill v. Gill, 4 Ohio Misc. 141, 33 Ohio Op. 2d 211, 212 N.E.2d 83 (Prob. Ct. 1965).

[FN9] Cal.—In re Doescher's Estate, 217 Cal. App. 2d 104, 31 Cal. Rptr. 346 (2d Dist. 1963).

Ohio—Gill v. Gill, 4 Ohio Misc. 141, 33 Ohio Op. 2d 211, 212 N.E.2d 83 (Prob. Ct. 1965).

[FN10] U.S.—Equitable Life Assur. Soc. of U.S. v. Rose, 248 F. Supp. 937 (D. Colo. 1965).

Mich.—Brooks v. Gillow, 352 Mich. 189, 89 N.W.2d 457 (1958).

[FN11] Or.—Rowe v. Rowe, 219 Or. 599, 347 P.2d 968 (1959).

Tex.—Taysum v. El Paso Nat. Bank, 256 S.W.2d 172 (Tex. Civ. App. El Paso 1952), writ refused.

[FN12] U.S.—Bingen v. First Trust Co. of St. Paul, 103 F.2d 260 (C.C.A. 8th Cir. 1939).

[FN13] Ill.—Cazel v. Cazel, 22 Ill. 2d 339, 175 N.E.2d 403 (1961).

[FN14] Wis.—Wyse v. Puchner, 260 Wis. 365, 51 N.W.2d 38 (1952).

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§ 47. Subject matter or property

West's Key Number Digest

West's Key Number Digest, Trusts ⚷21(2)

The declaration must describe the subject matter or property embraced in the trust with reasonable certainty.

The requirement of certainty in the material terms of the declaration of trust extends to and includes the subject matter or property embraced in the trust.[FN1] The property must be identified with as much certainty as is required in a deed of conveyance.[FN2] However, reasonable certainty in the designation of the trust estate may be sufficient,[FN3] and, if the subject of the trust is made sufficiently clear that the proper court can judicially determine it, that will be sufficient.[FN4]

[FN1] U.S.—In re Fains, 37 B.R. 539 (Bankr. E.D. Pa. 1984).

Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

[FN2] Wash.—Laughlin v. March, 19 Wash. 2d 874, 145 P.2d 549 (1944).

[FN3] U.S.—Mahaffey v. Helvering, 140 F.2d 879 (C.C.A. 8th Cir. 1944).

[FN4] Wis.—Wyse v. Puchner, 260 Wis. 365, 51 N.W.2d 38 (1952).

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§ 48. Beneficiaries

West's Key Number Digest

West's Key Number Digest, Trusts 🔑21(2)

The objects or beneficiaries of a trust must be designated with certainty.

To create a trust, the person intended to be the beneficiary must be identified with certainty.[FN1] The beneficiaries must be so designated or described as to be capable of identification[FN2] or of being ascertained.[FN3] It is sufficient, however, if the language used clearly points out the beneficiaries[FN4] or if they are made sufficiently certain that the proper court can determine them.[FN5]

Designation of beneficiaries as a class is a sufficiently certain designation,[FN6] provided that the class is clearly defined.[FN7] It is not necessary that the beneficiaries all be named or in existence or known at the time of the creation of the trust.[FN8] A trust is valid although the beneficiaries are left to be determined by the will of the settlor.[FN9] Certainty as to all beneficiaries of a trust is not essential to its validity as long as it is certain as to some, since as to those it will be held valid, although not as to the uncertain ones.[FN10] A trust conferring on the trustee ample power to determine the beneficiaries thereof has been held not uncertain.[FN11] A trust leaving to the discretion of the trustee the selection of beneficiaries from a certain class is valid,[FN12] even though the trustee has discretion to exclude some members of the class altogether.[FN13]

[FN1] Tex.—Longoria v. Lasater, 292 S.W.3d 156 (Tex. App. San Antonio 2009), reh'g overruled, (May 1, 2009) and review denied, (Aug. 28, 2009).

As to who may be beneficiary, see § 24.

As to definiteness and certainty required with respect to beneficiaries of a charitable trust, see C.J.S., Charities § 29.

[FN2] N.Y.—National Ins. & Guarantee Corp. Limited v. Vander Veer, 66 Misc. 2d 862, 322 N.Y.S.2d 293 (Sup 1971).

S.C.—Black v. Gettys, 238 S.C. 167, 119 S.E.2d 660 (1961).

[FN3] Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

Ascertained objectively, solely from standards in instrument

La.—Succession of Fellman, 698 So. 2d 477 (La. Ct. App. 4th Cir. 1997), writ denied, 704 So. 2d 1193 (La. 1997) and writ denied, 704 So. 2d 1193 (La. 1997).

[FN4] U.S.—King v. Richardson, 136 F.2d 849 (C.C.A. 4th Cir. 1943).

Pa.—In re Girard Trust Corn Exchange Bank, 418 Pa. 112, 208 A.2d 857 (1965).

[FN5] Wis.—Wyse v. Puchner, 260 Wis. 365, 51 N.W.2d 38 (1952).

[FN6] Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

N.Y.—Ministers and Missionaries Ben. Bd. of Am. Baptist Convention v. McKay, 64 Misc. 2d 231, 315 N.Y.S.2d 549 (Sup 1970).

[FN7] Or.—Agan v. U. S. Nat. Bank, 227 Or. 619, 363 P.2d 765 (1961).

Definite class held designated

Cal.—Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1st Dist. 1970).

N.Y.—Ministers and Missionaries Ben. Bd. of Am. Baptist Convention v. McKay, 64 Misc. 2d 231, 315 N.Y.S.2d 549 (Sup 1970).

[FN8] Conn.—DiSesa v. Hickey, 160 Conn. 250, 278 A.2d 785 (1971).

Tex.—Zahn v. National Bank of Commerce of Dallas, 328 S.W.2d 783 (Tex. Civ. App. Dallas 1959), writ refused n.r.e., (Mar. 30, 1960).

[FN9] Conn.—DiSesa v. Hickey, 160 Conn. 250, 278 A.2d 785 (1971).

[FN10] La.—Succession of Harper, 147 So. 2d 425 (La. Ct. App. 2d Cir. 1962).

[FN11] Iowa—In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 (1967).

[FN12] Tex.—Zweig v. Zweig, 275 S.W.2d 201 (Tex. Civ. App. San Antonio 1955), writ refused n.r.e., (May 18, 1955).

[FN13] Ohio—Moskowitz v. Federman, 72 Ohio App. 149, 27 Ohio Op. 53, 51 N.E.2d 48 (9th Dist. Summit County 1943).

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§ 49. Interests of beneficiaries

West's Key Number Digest

West's Key Number Digest, Trusts 🔑21(2)

In an express or voluntary trust, the declaration of trust must show the nature of the interest of the beneficiary and the quantity or extent of each beneficiary's interest.

The certainty required in a declaration of trust extends to the nature of the interest of the beneficiary,[FN1] and the quantity or amount of each beneficiary's interest.[FN2] While a trust is valid where it is imperative as to the amount to be used for the beneficiary, where the amounts, if any, which the beneficiaries are to receive are wholly discretionary with the alleged trustee, the trust is too uncertain to be enforceable.[FN3] However, a trust leaving to the discretion of the trustee the determination of the proportion or amount the beneficiaries shall receive is valid and enforceable as long as the trustee must divide the property to the class designated.[FN4]

Respective interests need not be designated where there are several beneficiaries, as it is presumed they take equal interests, so that the trust is not uncertain.[FN5] It is not essential that a beneficiary should have the entire beneficial interest or that the extent of the interest of the beneficiary be definite or definitely ascertainable at the time of the creation of the trust.[FN6]

[FN1] Okla.—Barnes v. Barnes, 1955 OK 34, 280 P.2d 996 (Okla. 1955).

[FN2] Ill.—Jones v. McCollen, 85 Ill. App. 2d 375, 227 N.E.2d 788 (4th Dist. 1967).

[FN3] Iowa—Ponzelino v. Ponzelino, 238 Iowa 201, 26 N.W.2d 330 (1947).

As to judicial control and supervision of trustee, see §§ 352 to 365.

[FN4] Iowa—Gunn v. Wagner, 242 Iowa 1001, 48 N.W.2d 292 (1951).

Tex.—Heironimus v. Tate, 355 S.W.2d 76 (Tex. Civ. App. Austin 1962), writ refused n.r.e., (May 30, 1962).

[FN5] Iowa—In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 (1967).

S.C.—Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 A.L.R.3d 918 (1975).

[FN6] Ill.—Cazel v. Cazel, 22 Ill. 2d 339, 175 N.E.2d 403 (1961).

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§ 50. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑30.5, 30.5(1)

Whether or not a particular agreement or transaction creates an express trust depends on the intention of the parties.

Generally speaking, whether or not a particular agreement or transaction creates an express trust depends on the intention of the parties as indicated by their acts and declarations and the surrounding circumstances.[FN1] For a transfer of real property to a trust to be real, valid, and nonillusory, the party transferring the property must effectuate a completed inter vivos transfer by conveyance that both divests him or her of all ownership in the property, and also, at the time of the conveyance, is made with the proper donative intent.[FN2] A trust may be created by a contract based on a valuable consideration to stand seized to the use of, or in trust for, another.[FN3] Any agreement or contract in writing made by a person having the power of disposal over property, whereby such person agrees or directs that particular property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, raises a trust in favor of such other person against the person making it.[FN4]

An insured who has been partially compensated for a loss by an insurer and then recovers a settlement or judgment from the tortfeasor holds the insurer's subrogated interest in trust.[FN5]

[FN1] U.S.—Business Men's Assur. Co. of America v. Northern California Veneer, Inc., 453 F.2d 387 (9th Cir. 1971).

N.Y.—National Ins. & Guarantee Corp. Limited v. Vander Veer, 66 Misc. 2d 862, 322 N.Y.S.2d 293 (Sup 1971).

Utah—National Sur. Corp. v. Christiansen Bros., Inc., 29 Utah 2d 460, 511 P.2d 731 (1973).

As to elements and requisites of express trust, generally, see § 21.

As to expression of intention in declaration of trust, see § 43.

[FN2] R.I.—Pezza v. Pezza, 690 A.2d 345 (R.I. 1997).

[FN3] Mich.—Wayne Creamery v. Clements, 14 Mich. App. 50, 165 N.W.2d 508 (1968).

Wash.—Senfour Inv. Co. v. King County, 66 Wash. 2d 67, 401 P.2d 319 (1965).

[FN4] U.S.—Logan Planing Mill Co. v. Fidelity & Cas. Co. of New York, 212 F. Supp. 906 (S.D. W. Va. 1962).

Ky.—Compton v. Compton, 435 S.W.2d 76 (Ky. 1968).

As to agreement of person acquiring title to hold or convey to use of another, see § 54.

Nominee agreement

Nominee agreement establishing ownership of corporate stock and requiring nominee to take no actions on behalf of principal or with regard to principal's interest in corporation absent instruction was declaration of trust, even though nominee at all times retained ownership of stock certificates.

N.Y.—Yemini v. Goldberg, 60 A.D.3d 935, 876 N.Y.S.2d 89 (2d Dep't 2009).

[FN5] N.M.—Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 903 P.2d 834 (1995).

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§ 51. Conveyances or transfers absolute in term

West's Key Number Digest

West's Key Number Digest, Trusts 30.5, 30.5(1)

A conveyance or transfer of real or personal property absolute in form may be held to have been made in trust and the grantee may be held to be a trustee.

Subject to limitations imposed by the statute of frauds with respect to real property, where the prior or contemporaneous acts, declarations, and agreements of the parties evidence an intent and understanding that the grantee was to take and hold the property for a trust purpose, the conveyance or transfer of real[FN1] or personal property by a conveyance or transfer absolute in form[FN2] is made in trust and the grantee is a trustee. One who has made an absolute conveyance of property may not, however, fasten a trust on the conveyance by his or her own subsequent acts and declarations alone, although such subsequent acts and declarations are sometimes considered in connection with prior and contemporaneous ones in determining whether or not a trust exists.[FN3] While there is no objection to the grantee subsequently declaring that he or she holds in trust,[FN4] statements made by a grantee to third persons, not agents or representatives of the grantor, to the effect that the grantee would hold the property subject to a trust do not create a trust enforceable against the grantee.[FN5] An intention to create a trust must exist, and such intention must be communicated to the grantee.[FN6]

[FN1] Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

Or.—Belton v. Buesing, 240 Or. 399, 402 P.2d 98 (1965).

As to parol trusts and effect of statute of frauds, see §§ 27 to 37.

[FN2] U.S.—Walberg v. Smyth, 142 F. Supp. 293 (N.D. Cal. 1956).

Or.—Belton v. Buesing, 240 Or. 399, 402 P.2d 98 (1965).

[FN3] Ohio—Showalter v. Miller, 70 Ohio App. 232, 25 Ohio Op. 22, 45 N.E.2d 774 (9th Dist. Summit County 1941).

[FN4] Wash.—Porter v. Laue, 44 Wash. 2d 451, 267 P.2d 1064 (1954).

[FN5] Cal.—Hill v. Donnelly, 43 Cal. App. 2d 47, 110 P.2d 135 (1st Dist. 1941).

[FN6] Ohio—Showalter v. Miller, 70 Ohio App. 232, 25 Ohio Op. 22, 45 N.E.2d 774 (9th Dist. Summit County 1941).

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§ 52. Conveyances containing reservations, conditions, or other provisions indicating trust

West's Key Number Digest

West's Key Number Digest, Trusts 30.5, 30.5(1)

An express trust may be created by a deed or other transfer containing conditions, reservations, or other provisions sufficiently indicating an intention that the title shall be held in trust.

An express trust may be created not only by a deed or conveyance which expressly provides that the property conveyed shall be held for the beneficiary[FN1] but also by a deed or other transfer containing conditions, reservations, or other provisions sufficiently indicating an intention that the title shall be held in trust.[FN2] On the other hand, in order that an instrument may operate as a trust deed, the essentials of such a deed must be present.[FN3] So a deed does not of itself operate as a declaration of trust where the words claimed to be sufficient for that purpose are merely declaratory of the object and purpose in making an absolute conveyance.[FN4]

[FN1] Kan.—Jennings v. Murdock, 220 Kan. 182, 553 P.2d 846 (1976).

[FN2] Ariz.—Lane Title & Trust Co. v. Brannan, 103 Ariz. 272, 440 P.2d 105 (1968).

Ill.—Caleca v. Caleca, 63 Ill. App. 3d 414, 20 Ill. Dec. 515, 380 N.E.2d 493 (3d Dist. 1978).

[FN3] Fla.—Smehyl v. Hammond, 44 So. 2d 678 (Fla. 1950).

[FN4] Ind.—Wetter v. City of Indianapolis, 248 Ind. 367, 226 N.E.2d 886 (1967).

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§ 53. Settlor as trustee

West's Key Number Digest

West's Key Number Digest, Trusts 30.5, 30.5(2)

A person may create a trust in his or her own personal or real property by constituting himself or herself a trustee thereof.

It is not essential in all cases that the creator of a trust appoint a third person trustee and transfer the legal title to him or her.[FN1] Rather, one may create a trust in his or her own personal property by constituting himself or herself trustee,[FN2] where the settlor's words or acts clearly and unequivocally denote an intention to hold henceforth as trustee for the benefit of another,[FN3] even in the absence of a consideration.[FN4] The owner of real property may also constitute himself or herself a trustee for the benefit of another.[FN5]

With respect to personal property, while the view has been expressed that title must pass from the owner as an individual,[FN6] since the nature and effect of a transaction of this character are such that the legal title remains in the donor for the benefit of the donee, no transfer or assignment of the legal title is necessary.[FN7] Although in order to create a trust, it is necessary that the equitable title or interest shall pass to the beneficiary,[FN8] and there must be an intent to establish a present trust and create an equitable interest in the beneficiary,[FN9] an unequivocal declaration by the settlor that he or she holds property at the present time passes the equitable title or interest to the beneficiary.[FN10]

A trust does not arise in the absence of the owner's intention to create a trust.[FN11] The owner should declare in unmistakable terms that he or she means to stand in a fiduciary relation to the object of his or her bounty.[FN12] Although any words which indicate with sufficient certainty an intention to create a trust will be effective,[FN13] the mere expression of an intention or an intention not carried into effect[FN14] to create a trust is not sufficient.

[FN1] Del.—Delaware Trust Co. v. Fitzmaurice, 27 Del. Ch. 101, 31 A.2d 383 (1943), decree modified on other grounds, 27 Del. Ch. 374, 38 A.2d 463 (1944).

Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, 190 S.W.2d 636 (Mo. Ct. App. 1945).

As to transfer of legal title to trustee, see § 66.

[FN2] U.S.—Clifford v. Helvering, 105 F.2d 586 (C.C.A. 8th Cir. 1939), judgment rev'd on other grounds, 309 U.S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940).

Ohio—Miller v. Bowers, 163 Ohio St. 421, 56 Ohio Op. 375, 127 N.E.2d 201 (1955).

As to eligibility of settlor to office of trustee, see §§ 296, 297.

As to trust involving bank deposit, see §§ 55 to 57.

[FN3] N.Y.—In re Schultz' Estate, 152 N.Y.S.2d 959 (Sur. Ct. 1956).

Ohio—Miller v. Bowers, 163 Ohio St. 421, 56 Ohio Op. 375, 127 N.E.2d 201 (1955).

[FN4] Del.—Bodley v. Jones, 27 Del. Ch. 273, 32 A.2d 436 (1943).

[FN5] Pa.—In re Sayre's Estate, 443 Pa. 548, 279 A.2d 51 (1971).

[FN6] Tenn.—Ferry v. Bryant, 19 Tenn. App. 612, 93 S.W.2d 344 (1935).

[FN7] U.S.—United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946).

Del.—Jones v. Bodley, 26 Del. Ch. 218, 27 A.2d 84 (1942), rev'd on other grounds, 27 Del. Ch. 273, 32 A.2d 436 (1943).

As to necessity of transfer of title where third person is made trustee, see § 66.

[FN8] U.S.—Bingen v. First Trust Co. of St. Paul, 103 F.2d 260 (C.C.A. 8th Cir. 1939).

[FN9] Mass.—Rock v. Rock, 309 Mass. 44, 33 N.E.2d 973 (1941).

[FN10] Del.—Jones v. Bodley, 26 Del. Ch. 218, 27 A.2d 84 (1942), rev'd on other grounds, 27 Del. Ch. 273, 32 A.2d 436 (1943).

Ohio—Thomas v. Dye, 66 Ohio L. Abs. 391, 117 N.E.2d 515 (C.P. 1953), judgment rev'd on other grounds, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 2d Dist. Franklin County 1954).

[FN11] Ohio—Rosselott v. Rosselott, 93 Ohio App. 425, 51 Ohio Op. 180, 113 N.E.2d 639 (1st Dist. Hamilton County 1952).

[FN12] Ohio—Rosselott v. Rosselott, 93 Ohio App. 425, 51 Ohio Op. 180, 113 N.E.2d

639 (1st Dist. Hamilton County 1952).

[FN13] Ky.—DeLeuil's Ex'rs v. DeLeuil, 255 Ky. 406, 74 S.W.2d 474 (1934).

[FN14] N.Y.—In re Tobin's Estate, 113 N.Y.S.2d 831 (Sur. Ct. 1952).

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§ 54. Agreement by person acquiring title to hold or convey to use of another

West's Key Number Digest

West's Key Number Digest, Trusts 🔑35, 35(1) to 35(4)

In the absence of a statute to the contrary, a person acquiring title to property may create an enforceable express trust by agreeing to hold in trust for another or to convey or transfer to such other.

Subject to provisions of statutes regulating the creation and validity of trusts and the statute of frauds, a person acquiring title to property may create an enforceable express trust in the property by agreeing to hold in trust for another[FN1] or to convey or transfer to such other[FN2] on the happening of a certain contingency.[FN3]

In any event, it is essential that there be an agreement.[FN4] An agreement by the grantee of land that the grantor is to control the property, and that the grantee will join the grantor in any deed, does not create a trust, where no deed is directed by the grantor.[FN5]

A trust cannot be established by an executory contract to sell or convey[FN6] or reconvey,[FN7] or an option to purchase.[FN8] In some jurisdictions, an enforceable express trust may be created by an agreement thereafter to purchase or acquire title to land for the benefit of another who agrees to[FN9] and does[FN10] pay the consideration. A promise to buy land and convey it to another, who has no interest in the land and who does not furnish any part of the purchase money, does not create a trust.[FN11]

An express trust may be created by an agreement between or among persons jointly purchasing or acquiring title to land or other property that title shall be taken in the name of less than all for the benefit of all.[FN12]

[FN1] U.S.—Manufacturers Life Ins. Co. v. Klepper, 168 F. Supp. 251 (D.N.J. 1958).

La.—Cavallino v. Cavallino, 231 So. 2d 623 (La. Ct. App. 4th Cir. 1970), writ not considered, 256 La. 73, 235 So. 2d 98 (1970).

N.C.—Bingham v. Lee, 266 N.C. 173, 146 S.E.2d 19 (1966).

As to parol trusts and effect of statute of frauds, see §§ 27 to 37.

Holding for specific purposes or benefit of others

Under Tennessee law, when a person has or accepts possession of personal property with the express or implied understanding that he or she is not to hold it as his or her own absolute property but is to hold and apply it for certain specific purposes or for the benefit of certain specified persons, a valid and enforceable express trust exists.

U.S.—In re Cannon, 277 F.3d 838, 2002 FED App. 0026P (6th Cir. 2002).

[FN2] Cal.—Leemhuis v. Leemhuis, 137 Cal. App. 2d 117, 289 P.2d 852 (2d Dist. 1955).

Ky.—Morris v. Thomas, 310 Ky. 501, 220 S.W.2d 958 (1949).

[FN3] Vt.—Vilas v. Seith, 108 Vt. 526, 189 A. 862 (1937).

[FN4] Mich.—Warren Tool Co. v. Stephenson, 11 Mich. App. 274, 161 N.W.2d 133, 5 U.C.C. Rep. Serv. 1017 (1968).

Neb.—Allen v. Mayo, 203 Neb. 602, 279 N.W.2d 617 (1979).

[FN5] Ky.—Johnson v. Wikstrom, 242 Ky. 636, 47 S.W.2d 61 (1932).

[FN6] N.Y.—Seidel v. Werner, 81 Misc. 2d 220, 364 N.Y.S.2d 963 (Sup 1975), judgment aff'd, 50 A.D.2d 743, 376 N.Y.S.2d 139 (1st Dep't 1975).

[FN7] Tex.—Roach v. Grant, 134 Tex. 10, 130 S.W.2d 1019 (Comm'n App. 1939).

[FN8] U.S.—Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943), judgment aff'd, 140 F.2d 934 (C.C.A. 4th Cir. 1944).

Tex.—Michael v. Busby, 139 Tex. 278, 162 S.W.2d 662 (1942).

[FN9] S.C.—Nelson v. Bryant, 265 S.C. 558, 220 S.E.2d 647 (1975).

Tex.—Glenn v. Daniel, 337 S.W.2d 319 (Tex. Civ. App. Eastland 1960), writ refused n.r.e., (Oct. 26, 1960).

[FN10] N.C.—Creech v. Creech, 222 N.C. 656, 24 S.E.2d 642 (1943).

Tex.—LaForce v. Bracken, 163 S.W.2d 239 (Tex. Civ. App. Texarkana 1942), judg-

ment aff'd, 141 Tex. 18, 169 S.W.2d 465 (1943).

[FN11] Tex.—Lobban v. Wierhauser, 141 S.W.2d 384 (Tex. Civ. App. San Antonio 1940), writ refused.

[FN12] Tex.—Cluck v. Sheets, 171 S.W.2d 857 (Tex. Civ. App. Beaumont 1942), judgment aff'd, 141 Tex. 219, 171 S.W.2d 860 (1943).

As to resulting trust arising from joint purchase of property, see §§ 139, 154, 155.

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§ 55. Deposit of money in bank or other financial institution

West's Key Number Digest

West's Key Number Digest, Trusts 🔑34, 34(1) to 34(4)

A trust may be created of money deposited in a bank, provided that all the essentials of a trust are present.

Generally, a trust with respect to money deposited in a bank may be created[FN1] by the owner and depositor of the money[FN2] under an agreement with the bank[FN3] for the benefit of one other than the depositor.[FN4] The depositor may also name himself or herself a trustee with respect to the deposited money.[FN5] The declaration of trust may be made after the deposit is made,[FN6] but it is necessary that the essentials of a trust should be present in order to create an express trust.[FN7]

Primarily, the intention of the depositor controls in determining whether or not a trust has been created[FN8] and the terms of the trust.[FN9] No trust is created in the absence of such intention[FN10] or if the intention is not given effect.[FN11] Usually, in deciding as to the existence of a trust,[FN12] the question is determined as one of fact and not of law.[FN13]

It is not necessary that the depositor should technically and precisely declare his or her purpose and intention to create a trust,[FN14] and the absence of the word "trust" or "trustee" from the title of the account does not prevent a determination that a trust has been created where the essentials of a trust are present.[FN15] On the other hand, while the fact that the deposit is in form in trust for one other than the depositor is some proof of intention[FN16] and may control in the absence of countervailing circumstances,[FN17] the fact that the depositor is designated as trustee[FN18] for another[FN19] is not necessarily controlling or conclusive and will not prevail where there is an absence of an intention to create a trust,[FN20] as shown by the surrounding circumstances.[FN21]

According to some courts, making a particular deposit in the name of the depositor which

on the face of the deposit or account is in trust for another creates a trust,[FN22] especially where the fact of such a deposit has been communicated to the beneficiary,[FN23] which may be complete or irrevocable.[FN24] There is also authority for the view that the mere deposit of money in a bank in trust for another is equivocal and ambiguous[FN25] and is not sufficient alone to create an enforceable trust,[FN26] that there must in addition be some unequivocal act or declaration showing an intention to create a trust,[FN27] and that, where a person deposits money in a bank in his or her own name in trust for another and retains full control over such money, a trust is not created.[FN28]

[FN1] U.S.—Gross v. Douglass State Bank, 261 F. Supp. 1002 (D. Kan. 1965).

Md.—Nicholas v. Owrutsky, 230 Md. 60, 185 A.2d 498 (1962).

As to notice to, or knowledge of, beneficiary, see § 65.

As to bank as trustee of deposits in general, see C.J.S., Banks and Banking §§ 297, 639.

As to deposit of trust funds in bank in general, see C.J.S., Banks and Banking § 302.

As to gift of bank deposit, see C.J.S., Gifts §§ 55 to 60, 115 to 118.

[FN2] Mo.—Butler State Bank v. Duncan, 319 S.W.2d 913 (Mo. Ct. App. 1959).

Pa.—In re Dillon's Estate, 441 Pa. 206, 272 A.2d 161 (1971).

[FN3] Cal.—Katz v. Greeninger, 96 Cal. App. 2d 245, 215 P.2d 121 (1st Dist. 1950).

[FN4] Cal.—Katz v. Greeninger, 96 Cal. App. 2d 245, 215 P.2d 121 (1st Dist. 1950).

N.Y.—Del Bello v. Westchester County Bar Ass'n, 19 N.Y.2d 466, 280 N.Y.S.2d 651, 227 N.E.2d 579 (1967).

[FN5] Ill.—In re Petralia's Estate, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

Mo.—Farrell v. Coulter, 898 S.W.2d 139 (Mo. Ct. App. E.D. 1995).

[FN6] Tenn.—Derrick v. Lumpkins, 20 Tenn. App. 77, 95 S.W.2d 939 (1936).

[FN7] N.C.—Wescott v. First & Citizens Nat. Bank of Elizabeth City, 227 N.C. 39, 40 S.E.2d 461 (1946).

Trust created in attorney escrow account

U.S.—In re Cannon, 277 F.3d 838, 2002 FED App. 0026P (6th Cir. 2002) (under Tennessee law).

[FN8] U.S.—U. S. v. Williams, 160 F. Supp. 761 (D.N.J. 1958).

Md.—Jones v. Hamilton, 211 Md. 371, 127 A.2d 519 (1956).

[FN9] Ill.—In re Anderson's Estate, 69 Ill. App. 2d 352, 217 N.E.2d 444 (1st Dist. 1966).

[FN10] La.—Succession of Shadrick, 129 So. 2d 606 (La. Ct. App. 2d Cir. 1961).

Md.—Nicholas v. Owrutsky, 230 Md. 60, 185 A.2d 498 (1962).

[FN11] Vt.—Methodist Church of Sandgate v. First Nat. Bank of North Bennington, 125 Vt. 124, 211 A.2d 168 (1965).

[FN12] U.S.—Logan Planing Mill Co. v. Fidelity & Cas. Co. of New York, 212 F. Supp. 906 (S.D. W. Va. 1962).

[FN13] Tenn.—Derrick v. Lumpkins, 20 Tenn. App. 77, 95 S.W.2d 939 (1936).

[FN14] Mo.—Butler State Bank v. Duncan, 319 S.W.2d 913 (Mo. Ct. App. 1959).

[FN15] Idaho—Vaughan v. First Federal Sav. & Loan Ass'n, 85 Idaho 266, 378 P.2d 820 (1963).

[FN16] Mo.—Masterson v. Plummer, 343 S.W.2d 352 (Mo. Ct. App. 1961).

[FN17] Md.—Blair v. Haas, 215 Md. 105, 137 A.2d 145 (1957).

[FN18] Conn.—Fruchtman v. Manning, 156 Conn. 500, 242 A.2d 723 (1968).

[FN19] Ohio—In re Hoffman's Estate, 175 Ohio St. 363, 25 Ohio Op. 2d 270, 195 N.E.2d 106 (1963).

[FN20] Conn.—Stamford Sav. Bank v. Everett, 132 Conn. 92, 42 A.2d 662 (1945).

[FN21] R.I.—Malley's Estate v. Malley, 69 R.I. 407, 34 A.2d 761 (1943).

[FN22] Mass.—Buteau v. Lavalle, 284 Mass. 276, 187 N.E. 628 (1933).

Vt.—In re Estate of Adams, 155 Vt. 517, 587 A.2d 958 (1990).

[FN23] R.I.—Slepkow v. McSoley, 54 R.I. 210, 172 A. 328 (1934).

[FN24] N.J.—Mucha v. Jackson, 119 N.J. Eq. 348, 182 A. 827 (Ch. 1936).

Vt.—In re Estate of Adams, 155 Vt. 517, 587 A.2d 958 (1990).

As to revocation of bank deposit trusts in general, see § 105.

[FN25] Tex.—Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943).

[FN26] Conn.—Fasano v. Meliso, 146 Conn. 496, 152 A.2d 512 (1959).

Ohio—In re Hoffman's Estate, 175 Ohio St. 363, 25 Ohio Op. 2d 270, 195 N.E.2d 106 (1963).

[FN27] Ohio—In re Hoffman's Estate, 175 Ohio St. 363, 25 Ohio Op. 2d 270, 195 N.E.2d 106 (1963).

[FN28] Conn.—Fruchtman v. Manning, 156 Conn. 500, 242 A.2d 723 (1968).

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§ 56. Deposit of money in bank or other financial institution—Account in several names

West's Key Number Digest

West's Key Number Digest, Trusts 🔑34, 34(1) to 34(4)

A trust may be created by a bank deposit in the form of a joint account or an account in several names.

In some jurisdictions at least, the fact that a bank account is in form a joint account or an account in several names does not necessarily prevent the existence of a trust in it.[FN1] Since the question as to whether a trust has been created is primarily one of intention,[FN2] in the absence of an intention on the part of the depositor to create a trust, no trust arises.[FN3]

Although an account or deposit in the name of two persons, or the survivor of them, does not necessarily create a trust,[FN4] some courts have held that a depositor, by making such a deposit of his or her funds, may create a trust[FN5] for the benefit of the other person named[FN6] in the balance of the deposit at the death of the depositor.[FN7] As a general rule, there is a sufficient declaration of trust where the entry by the depositor is in trust for himself or herself and another, as joint owners, subject to the order of either, balance at death of either to belong to the survivor,[FN8] with the deposit as the corpus, the depositor as trustee, and the depositor and another as beneficiaries.[FN9] Unexplained, these facts indicate an intention to create a trust.[FN10] In such cases, the balance at the death of either belongs to the survivor, not by a gift and delivery of the bankbook, or by right of survivorship of one of two joint owners, or by a gift of the funds inter vivos, but purely and exclusively because of the trust.[FN11] However, such an entry may be explained and the intention it indicates may be rebutted.[FN12] The fact that the depositor retains the passbook[FN13] or retains the right to withdraw all or any portion of the deposit[FN14] does not prevent the existence of a trust.

Where an owner with a single account in a bank signs an order in a proper form for the transfer of the account into a trust account for the owner and another, such an order is suffi-

cient to authorize the bank to transfer the account to a trust form, notwithstanding the fact that the order does not state the amount of the account or the account number.[FN15] Where the account is made a joint account merely for the convenience and benefit of the depositor, the person so designated holds whatever title he or she acquires in trust for the depositor.[FN16]

A donor depositor's creation of a joint financial account is not typically intended to be for the benefit of a donee signatory until the donor's death, and absent evidence to the contrary, the donee is but a trustee of the account for the benefit of the donor during the donor's lifetime.[FN17]

[FN1] N.Y.—In re Haseltine's Will, 280 A.D. 857, 113 N.Y.S.2d 752 (1st Dep't 1952).

Ohio—Steiner v. Fecycz, 72 Ohio App. 18, 26 Ohio Op. 515, 50 N.E.2d 617 (7th Dist. Mahoning County 1942).

As to ownership of joint deposits in savings banks in general, see C.J.S., Banks and Banking § 641.

[FN2] Md.—Shaffer v. Lohr, 264 Md. 397, 287 A.2d 42 (1972).

N.D.—In re Berzel's Estate, 101 N.W.2d 557 (N.D. 1960).

Or.—Andrews v. Hochmuth, 253 Or. 313, 454 P.2d 636 (1969).

[FN3] Mo.—Clabbey v. First Nat. Bank, 320 S.W.2d 738 (Mo. Ct. App. 1959).

N.M.—LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969) (overruled on other grounds by, Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981)) and (overruled on other grounds by, Hughes v. Hughes, 96 N.M. 719, 634 P.2d 1271 (1981)).

[FN4] N.M.—Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940).

[FN5] Md.—Shirk v. Suburban Trust Co., 248 Md. 114, 235 A.2d 549 (1967).

Or.—Mowrey v. Jarvy, 228 Or. 96, 363 P.2d 733 (1961).

[FN6] Cal.—Randall v. Bank of America N.T. & S.A., 48 Cal. App. 2d 249, 119 P.2d 754 (4th Dist. 1941).

[FN7] Cal.—Randall v. Bank of America N.T. & S.A., 48 Cal. App. 2d 249, 119 P.2d 754 (4th Dist. 1941).

Mass.—Burns v. Paquin, 345 Mass. 329, 187 N.E.2d 139 (1963).

[FN8] Md.—Arbaugh v. Hook, 254 Md. 146, 254 A.2d 187 (1969).

Mass.—Corrigan v. O'Brien, 353 Mass. 341, 231 N.E.2d 554 (1967).

[FN9] Md.—Fairfax v. Savings Bank of Baltimore, 175 Md. 136, 199 A. 872, 116 A.L.R. 1334 (1938).

[FN10] Md.—Whittington v. Whittington, 205 Md. 1, 106 A.2d 72, 49 A.L.R.2d 513 (1954).

[FN11] Md.—Mitchell v. Register of Wills for Baltimore City, 227 Md. 305, 176 A.2d 763 (1962).

[FN12] Md.—Arbaugh v. Hook, 254 Md. 146, 254 A.2d 187 (1969).

[FN13] Cal.—Randall v. Bank of America N.T. & S.A., 48 Cal. App. 2d 249, 119 P.2d 754 (4th Dist. 1941).

[FN14] Cal.—Bank of America Nat. Trust & Sav. Ass'n v. Long Beach Federal Sav. & Loan Ass'n, 141 Cal. App. 2d 618, 297 P.2d 443 (2d Dist. 1956).

Md.—Mitchell v. Register of Wills for Baltimore City, 227 Md. 305, 176 A.2d 763 (1962).

[FN15] Md.—Hancock v. Savings Bank of Baltimore, 199 Md. 163, 85 A.2d 770 (1952).

[FN16] Mo.—Keller v. Collison, 395 S.W.2d 729 (Mo. Ct. App. 1965).

Or.—Greenwood v. Beeson, 253 Or. 318, 454 P.2d 633 (1969).

[FN17] Or.—Robison v. Robison, 226 Or. App. 96, 203 P.3d 280 (2009).

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§ 57. Deposit of money in bank or other financial institution—Tentative trusts

West's Key Number Digest

West's Key Number Digest, Trusts 🔑34, 34(1) to 34(4)

Some courts have recognized that a tentative trust may be created where a deposit is made by the depositor in his or her own name in trust for another.

In some jurisdictions, while it is recognized that a trust may be created with respect to a bank deposit which is absolute and irrevocable by the donor or depositor,[FN1] in other cases in which saving deposits or accounts are involved,[FN2] the courts have recognized so-called tentative trusts[FN3] or Totten trusts,[FN4] as where a deposit is made by the depositor in his or her own name in trust for another.[FN5] The rule with respect to such deposits is that a deposit made by one person of his or her own money in his or her own name as trustee for another, standing alone, does not establish an irrevocable trust during the depositor's lifetime, but is a tentative trust merely, revocable at will,[FN6] until the depositor dies or completes the gift in his or her lifetime[FN7] by some unequivocal act or declaration,[FN8] such as delivery of the passbook or notice to the beneficiary.[FN9]

Unless set aside for fraud or incompetency,[FN10] the trust becomes absolute and irrevocable on the death of the depositor before the beneficiary without revocation or some decisive act or declaration of disaffirmance[FN11] and entitles the beneficiary to the balance remaining at the time of the depositor's death.[FN12] Whether the trust is tentative or irrevocable depends on the intention of the depositor or donor,[FN13] determinable as a question of fact.[FN14] The general rule that a trust does not arise unless the intent of the alleged settlor to create one clearly appears is applicable in determining whether a depositor who has created a tentative savings bank trust intended to make it irrevocable.[FN15] Clear and unambiguous language or conduct is required to establish such an intention.[FN16] In order to render a trust, tentative in form, absolute or irrevocable during the lifetime of the donor or depositor, the depositor's intention to transfer a present interest to the named beneficiary must ex-

ist,[FN17] and not an interest which would arise only after his or her death.[FN18]

While the delivery of the bankbook to the beneficiary has been held sufficient to transform a tentative trust into an irrevocable one,[FN19] it has also been held that notifying the named beneficiary of the deposit and its nature and delivering the passbook to such beneficiary for safekeeping do not conclusively establish an irrevocable trust.[FN20]

It is the general rule that whether any trust, tentative or irrevocable, is in fact created depends on the intention of the parties.[FN21]

[FN1] U.S.—Helfrich's Estate v. C I R, 143 F.2d 43 (C.C.A. 7th Cir. 1944).

Ky.—Hale v. Hale, 313 Ky. 344, 231 S.W.2d 2 (1950).

[FN2] Ky.—Hale v. Hale, 313 Ky. 344, 231 S.W.2d 2 (1950).

[FN3] Ariz.—Reidy v. Almich, 4 Ariz. App. 144, 418 P.2d 390 (Div. 2 1966).

Ky.—Dawson v. Dawson's Adm'x, 272 S.W.2d 666 (Ky. 1954).

Pa.—In re Sayre's Estate, 443 Pa. 548, 279 A.2d 51 (1971).

As to "tentative trust" defined, see § 15.

[FN4] U.S.—Belanger v. Salvation Army, 556 F.3d 1153 (11th Cir. 2009) (under Florida law).

Mo.—Estate of Bischof, 770 S.W.2d 474 (Mo. Ct. App. E.D. 1989).

N.Y.—Matter of Estate of Beck, 98 A.D.2d 860, 470 N.Y.S.2d 808 (3d Dep't 1983), order aff'd, 63 N.Y.2d 1026, 484 N.Y.S.2d 512, 473 N.E.2d 740 (1984).

Motive does not extinguish beneficiaries' interests

N.Y.—Kaminsky v. Smith, 40 A.D.2d 522, 334 N.Y.S.2d 544 (2d Dep't 1972).

[FN5] U.S.—Belanger v. Salvation Army, 556 F.3d 1153 (11th Cir. 2009) (under Florida law).

Pa.—In re Sayre's Estate, 443 Pa. 548, 279 A.2d 51 (1971).

[FN6] Cal.—Estate of Friedman, 20 Cal. App. 3d 399, 97 Cal. Rptr. 653 (2d Dist. 1971).

Colo.—Hall's Estate v. Father Flanagan's Boys' Home, 30 Colo. App. 296, 491 P.2d 614 (App. 1971).

Ill.—In re Montgomery's Estate, 2 Ill. App. 3d 821, 277 N.E.2d 739 (2d Dist. 1972),

judgment aff'd in part, rev'd in part on other grounds, 54 Ill. 2d 532, 301 N.E.2d 465, 64 A.L.R.3d 181 (1973).

As to revocation of trusts, generally, see §§ 99 to 112.

[FN7] U.S.—U.S. v. State Nat. Bank of Conn., 421 F.2d 519 (2d Cir. 1970).

N.Y.—Silber v. Lachs, 33 A.D.2d 544, 304 N.Y.S.2d 289 (1st Dep't 1969), order aff'd, 28 N.Y.2d 554, 319 N.Y.S.2d 447, 268 N.E.2d 126 (1971).

[FN8] U.S.—U.S. v. State Nat. Bank of Conn., 421 F.2d 519 (2d Cir. 1970).

Minn.—Jeruzal's Estate v. Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964).

[FN9] Minn.—Jeruzal's Estate v. Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964).

N.Y.—Silber v. Lachs, 33 A.D.2d 544, 304 N.Y.S.2d 289 (1st Dep't 1969), order aff'd, 28 N.Y.2d 554, 319 N.Y.S.2d 447, 268 N.E.2d 126 (1971).

[FN10] Minn.—Coughlin v. Farmers & Mechanics Sav. Bank of Minneapolis, 199 Minn. 102, 272 N.W. 166 (1937).

[FN11] N.Y.—Pass v. Spirt, 35 A.D.2d 858, 315 N.Y.S.2d 393 (3d Dep't 1970).

Pa.—In re Schuck's Estate, 419 Pa. 466, 214 A.2d 629 (1965).

[FN12] Ariz.—Reidy v. Almich, 4 Ariz. App. 144, 418 P.2d 390 (Div. 2 1966).

Ill.—In re Petralia's Estate, 48 Ill. App. 2d 122, 198 N.E.2d 200 (1st Dist. 1964), judgment aff'd, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

N.Y.—In re Witusik's Estate, 51 Misc. 2d 564, 273 N.Y.S.2d 550 (Sur. Ct. 1966).

As to presumption that absolute trust was created as to balance remaining on deposit after death of depositor without disaffirming trust, see § 74.

[FN13] Cal.—Roberts v. Goetz, 5 Cal. App. 3d 364, 85 Cal. Rptr. 84 (1st Dist. 1970).

Pa.—In re Furjanick's Estate, 375 Pa. 484, 100 A.2d 85 (1953).

[FN14] Cal.—Brucks v. Home Federal Sav. & Loan Ass'n, 36 Cal. 2d 845, 228 P.2d 545 (1951).

N.Y.—McKendry v. McKendry, 200 Misc. 835, 103 N.Y.S.2d 183 (Sup 1951).

Tentative trust held not created

Ark.—Washam v. First Nat. Bank, 248 Ark. 984, 455 S.W.2d 96 (1970).

[FN15] Pa.—In re Ingels' Estate, 372 Pa. 171, 92 A.2d 881 (1952).

[FN16] Pa.—In re Rodgers' Estate, 374 Pa. 246, 97 A.2d 789, 38 A.L.R.2d 1238 (1953).

[FN17] U.S.—Gross v. Douglass State Bank, 261 F. Supp. 1002 (D. Kan. 1965).

N.Y.—Bergmann v. Bergmann, 5 Misc. 2d 190, 159 N.Y.S.2d 844 (Sup 1957).

[FN18] N.Y.—McKendry v. McKendry, 200 Misc. 835, 103 N.Y.S.2d 183 (Sup 1951).

[FN19] N.Y.—Agretto v. Easton Indus. Corp., 44 Misc. 2d 654, 254 N.Y.S.2d 793 (Sup 1964).

[FN20] N.Y.—In re Slobiansky's Estate, 152 Misc. 232, 273 N.Y.S. 869 (Sur. Ct. 1934).

[FN21] N.Y.—In re Chiprout's Estate, 8 Misc. 2d 648, 166 N.Y.S.2d 570 (Sur. Ct. 1957).

Tex.—Citizens Nat. Bank of Breckenridge v. Allen, 575 S.W.2d 654 (Tex. Civ. App. Eastland 1978), writ refused n.r.e., (June 13, 1979).

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§ 58. Delivery or possession of personal property

West's Key Number Digest

West's Key Number Digest, Trusts 🔑33, 37.5

No trust is established where the trust agreement requires the delivery of property to the trustees, and no property is delivered to the trustees.

The common-law rule is that in order to establish a trust, there must be a transfer of property.[FN1] Moreover, no trust is established where the trust agreement requires the delivery of property to the trustees, and no property is delivered to the trustees.[FN2] Subject to general rules as to the essentials of an express trust, where a person has or accepts possession of personal property, with the express or implied understanding that he or she is not to hold it as his or her own absolute property but is to hold and apply it for certain specified purposes or for the benefit of certain specified persons, a valid and enforceable express trust exists.[FN3] Such a trust will be enforced in the absence of fraud, regardless of whether it was voluntary or based on a consideration.[FN4] Where securities are the subject matter of a trust created by declaration, the law of trust does not require that the securities be transferred to the settlor as trustee.[FN5]

The delivery of moneys by one person to another with instructions that they be paid to a third person may be effectual to create a trust for the latter's benefit[FN6] but only where the depositor's manifested intention read in connection with all the circumstances of the case indicates that the delivery was to be a finality and that the money was to be from that moment dedicated to the use of the third person.[FN7] On the other hand, no trust results, if the use of the money or property was intended to be subject to the directions of the person delivering it or if the holding was for his or her benefit and under his or her orders.[FN8]

No trust is created where possession is vested in a person merely as agent,[FN9] or if possession is vested in him or her as bailee,[FN10] pledgee,[FN11] or stakeholder.[FN12]

No trust is created where the transaction merely creates a debtor and creditor relationship,[FN13] as where the transaction is in the nature of a loan.[FN14] Where one person pays money to another, it depends on the manifested intention of the parties whether a trust or a debt is created.[FN15] If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created.[FN16] Where, however, the intention is that the person receiving the money shall have the unrestricted use of it, being liable to pay a similar amount,[FN17] with or without interest,[FN18] to the payor or to a third person, a debt is created. The intention of the parties will be ascertained by a consideration of their words and conduct in the light of surrounding circumstances.[FN19] A circumstance that may be important in determining the intention of the parties is the presence or absence of an agreement to pay interest on the money paid.[FN20]

[FN1] Mont.—McCormick v. Brevig, 1999 MT 86, 294 Mont. 144, 980 P.2d 603 (1999).

[FN2] Va.—Ballard v. McCoy, 247 Va. 513, 443 S.E.2d 146 (1994).

[FN3] U.S.—In re Cannon, 277 F.3d 838, 2002 FED App. 0026P (6th Cir. 2002) (under Tennessee law).

Kan.—Pizel v. Pizel, 7 Kan. App. 2d 388, 643 P.2d 1094 (1982).

Mass.—Bourgeois v. Hurley, 8 Mass. App. Ct. 213, 392 N.E.2d 1061 (1979).

As to creation of gift in contemplation of death by delivery to third person as trustee for donee, see C.J.S., Gifts § 112.

As to necessity of delivery of property, see § 68.

As to necessity of transfer of title, see § 66.

[FN4] Conn.—Hebrew University Ass'n v. Nye, 148 Conn. 223, 169 A.2d 641 (1961).

Tenn.—American Bank & Trust Co. v. Lebanon Bank & Trust Co., 28 Tenn. App. 618, 192 S.W.2d 245 (1945).

[FN5] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN6] N.Y.—Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei, 306 N.Y. 242, 117 N.E.2d 346 (1954).

[FN7] Cal.—Pollard v. Pollard, 166 Cal. App. 2d 698, 333 P.2d 356 (1st Dist. 1959).

N.Y.—Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei, 306 N.Y. 242, 117 N.E.2d 346 (1954).

[FN8] N.Y.—In re Randall's Estate, 2 Misc. 2d 257, 155 N.Y.S.2d 675 (Sur. Ct. 1956).

[FN9] Ohio—Adams v. Fleck, 8 Ohio Op. 2d 302, 80 Ohio L. Abs. 48, 154 N.E.2d 794 (Prob. Ct. 1958), judgment aff'd, 171 Ohio St. 451, 14 Ohio Op. 2d 313, 172 N.E.2d 126 (1961).

Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 359 Pa. 1, 58 A.2d 23 (1948).

As to "agency" distinguished from "trust," see C.J.S., Agency § 23.

[FN10] Iowa—Cornick v. Weir, 212 Iowa 715, 237 N.W. 245 (1931).

As to "bailment" distinguished from "trust," see C.J.S., Bailments § 8.

[FN11] U.S.—In re Third Ave. Transit Corp., 120 F. Supp. 839 (S.D. N.Y. 1954), order rev'd on other grounds, 222 F.2d 466 (2d Cir. 1955).

[FN12] Wis.—Stebbins v. Cosden Oil Co., 241 Wis. 72, 4 N.W.2d 282 (1942).

[FN13] Cal.—Marsh v. Home Fed. Sav. & Loan Assn., 66 Cal. App. 3d 674, 136 Cal. Rptr. 180 (4th Dist. 1977).

N.Y.—Guaranty Trust Co. of N.Y. v. Lyon, 124 N.Y.S.2d 680 (Sup 1953).

[FN14] Mo.—Wheat v. Platte City Ben. Assessment Special Road Dist. of Platte County, 227 Mo. App. 869, 59 S.W.2d 88 (1933).

[FN15] Cal.—Abrams v. Crocker-Citizens Nat. Bank, 41 Cal. App. 3d 55, 114 Cal. Rptr. 913 (1st Dist. 1974).

[FN16] Cal.—Petherbridge v. Prudential Sav. & Loan Assn., 79 Cal. App. 3d 509, 145 Cal. Rptr. 87 (4th Dist. 1978).

Tex.—Allen v. Wilkerson, 396 S.W.2d 493 (Tex. Civ. App. Austin 1965), writ refused n.r.e., (May 25, 1966).

[FN17] Ala.—First Nat. Bank of Mobile v. Pope, 274 Ala. 395, 149 So. 2d 781 (1963).

[FN18] Ohio—Norris v. Norris, 40 Ohio L. Abs. 293, 57 N.E.2d 254 (Ct. App. 2d Dist. Montgomery County 1943).

[FN19] Ohio—Norris v. Norris, 40 Ohio L. Abs. 293, 57 N.E.2d 254 (Ct. App. 2d Dist. Montgomery County 1943).

[FN20] Cal.—People v. Pierce, 110 Cal. App. 2d 598, 243 P.2d 585 (2d Dist. 1952).

Tex.—Allen v. Wilkerson, 396 S.W.2d 493 (Tex. Civ. App. Austin 1965), writ refused n.r.e., (May 25, 1966).

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§ 59. Proceeds of life insurance

West's Key Number Digest

West's Key Number Digest, Trusts 37

A trust in the proceeds of a life insurance policy may be created by a declaration or provision in the policy or by collateral declarations or transactions from which the intention to create a trust appears.

A trust in the proceeds of a life insurance policy or certificate may be created by a declaration or provision in the policy[FN1] or by collateral declarations or transactions from which the intention to create a trust appears,[FN2] as, for example, by an agreement between the insured and the designated beneficiary that such beneficiary shall pay over to a third person part or all of the proceeds.[FN3] While it has been held that such a trust cannot be created without the knowledge or consent of the person who became a beneficiary under the terms of the life insurance policy,[FN4] it has also been held that a trust may be created for another than the designated beneficiary where that is the intention of the insured although the designated beneficiary has no knowledge that he or she is so designated until after the death of the insured,[FN5] and his or her consent to act as trustee had not been obtained.[FN6]

The fact that proceeds of a life insurance policy are declared to be equitably conveyed to a trust created by the owner is independent of who pays the premiums, and it is immaterial to a determination of whether a valid trust is created whether the insured or settlor continued to pay the premiums.[FN7]

[FN1] Cal.—Fahrney v. Wilson, 180 Cal. App. 2d 694, 4 Cal. Rptr. 670 (3d Dist. 1960).

N.J.—In re Land's Estate, 99 N.J. Super. 500, 240 A.2d 453 (Ch. Div. 1968).

As to right of trustees named in policy to proceeds in general, see C.J.S., Insurance § 1956.

[FN2] N.Y.—Palmer v. MacDougall, 14 A.D.2d 580, 218 N.Y.S.2d 385 (2d Dep't 1961).

Pa.—Pugh v. Gaines, 156 Pa. Super. 613, 41 A.2d 287 (1945).

Inter vivos trust

Mo.—Duncan by Duncan v. Duncan, 884 S.W.2d 383 (Mo. Ct. App. S.D. 1994).

[FN3] U.S.—Haberland v. Haberland, 303 F.2d 345, 22 Ohio Op. 2d 73, 91 Ohio L. Abs. 412 (3d Cir. 1962).

Cal.—Fahrney v. Wilson, 180 Cal. App. 2d 694, 4 Cal. Rptr. 670 (3d Dist. 1960).

[FN4] Tex.—Olivares v. Olivares, 170 S.W.2d 575 (Tex. Civ. App. San Antonio 1943), dismissed.

[FN5] Mo.—Duncan by Duncan v. Duncan, 884 S.W.2d 383 (Mo. Ct. App. S.D. 1994).

[FN6] Pa.—Carter v. Carter, 321 Pa. 391, 184 A. 78 (1936).

[FN7] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

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§ 60. Property devised, bequeathed, or inherited

West's Key Number Digest

West's Key Number Digest, Trusts 🔑36

An express trust may be created by a promise by a devisee or legatee that he or she will devote his or her devise or legacy to a certain lawful purpose.

While a trust may be created by a promise, either express or implied, by the devisee or legatee, that he or she will devote a devise or legacy to a certain lawful purpose,[FN1] which promise induces the testator either to make a will or to change or not to change one already made,[FN2] usually, where a trust arises in such cases, it is treated as a constructive trust.[FN3]

In any event, the essentials of an express trust must be present in order to create such a trust, based on an alleged contract between a testator and a person taking under the will[FN4] or on directions of the testator not contained in the will.[FN5]

In order that a trust may be created with respect to property which has passed as a decedent estate, the essentials of a trust must exist.[FN6] A person who has no interest in such property may not create a trust with respect to the property.[FN7] An agreement by a party to a contract to hold his or her interest in personal property of a decedent's estate as collateral security for the benefit of the other party to the contract creates a trust.[FN8]

[FN1] U.S.—Markham v. Tibbetts, 79 F. Supp. 47 (S.D. N.Y. 1947), judgment modified on other grounds, 79 F. Supp. 60 (S.D. N.Y. 1947).

Ky.—Moore v. Garvey's Adm'r, 290 Ky. 61, 160 S.W.2d 363 (1942).

As to testamentary trusts in general, C.J.S., Wills §§ 1425 to 1513.

[FN2] U.S.—Markham v. Tibbetts, 79 F. Supp. 47 (S.D. N.Y. 1947), judgment modified on other grounds, 79 F. Supp. 60 (S.D. N.Y. 1947).

N.J.—Sick v. Weigand, 123 N.J. Eq. 239, 197 A. 413 (Ct. Err. & App. 1938).

[FN3] § 189.

[FN4] Cal.—O'Neil v. Ross, 98 Cal. App. 306, 277 P. 123 (1st Dist. 1929).

[FN5] Or.—Garde v. Goldsmith, 131 Or. 481, 283 P. 39 (1929).

[FN6] Ga.—Cornelison v. Sansom, 175 Ga. 467, 165 S.E. 264 (1932).

[FN7] Ga.—Cornelison v. Sansom, 175 Ga. 467, 165 S.E. 264 (1932).

[FN8] N.Y.—In re Leverich's Will, 135 Misc. 774, 238 N.Y.S. 533 (Sur. Ct. 1929), aff'd, 234 A.D. 625, 251 N.Y.S. 870 (2d Dep't 1931).

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§ 61. Transactions between persons in confidential, fiduciary, or family relation

West's Key Number Digest

West's Key Number Digest, Trusts ⚷30.5(2)

A trust may arise out of the nature and terms of transactions or agreements where the parties are related by blood or marriage or occupy some confidential or fiduciary relationship.

Trusts sometimes arise out of the nature and terms of transactions or agreements where the parties are related by blood or marriage[FN1] or occupy some confidential or fiduciary relationship.[FN2] In this connection, a fiduciary relationship exists where confidence is reposed on one side and there is resulting superiority and influence on the other.[FN3] Mere friendship does not constitute a confidential relationship in the absence of a showing of the exercise of undue influence.[FN4] In order to create an express trust in such a case, the essentials of a trust must exist,[FN5] including the intention to create a trust[FN6] and certainty.[FN7] Such transactions are not to be confused with those creating or intending to create some relation other than that of trustee and beneficiary,[FN8] and the facts in some cases, although involving transactions between persons related to each other, or occupying confidential relations, have been held insufficient to create an express trust, but to create, at the most, a mere agency.[FN9]

[FN1] U.S.—Leggett's Estate v. U. S., 418 F.2d 1257 (3d Cir. 1969).

Kan.—Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973).

Minn.—Johnson v. Johnson, 272 Minn. 284, 137 N.W.2d 840 (1965).

As to constructive trust arising out of family relation, see § 196.

[FN2] U.S.—Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972).

Fla.—In re Brown's Estate, 134 So. 2d 290 (Fla. Dist. Ct. App. 2d Dist. 1961).

N.Y.—First Westchester Nat. Bank v. Olsen, 19 N.Y.2d 342, 280 N.Y.S.2d 117, 227 N.E.2d 24 (1967).

Wife and husband

U.S.—In re Radin, 57 B.R. 346 (Bankr. S.D. Fla. 1986).

[FN3] N.Y.—First Westchester Nat. Bank v. Olsen, 19 N.Y.2d 342, 280 N.Y.S.2d 117, 227 N.E.2d 24 (1967).

[FN4] Cal.—Hausfelder v. Security-First Nat. Bank of Los Angeles, 77 Cal. App. 2d 478, 176 P.2d 84 (2d Dist. 1946).

[FN5] Ohio—Moll v. Moll, 109 Ohio App. 393, 11 Ohio Op. 2d 283, 166 N.E.2d 531 (2d Dist. Montgomery County 1959).

Pa.—Brown v. Monaca Federal Sav. & Loan Ass'n, 352 Pa. 1, 42 A.2d 50 (1945).

[FN6] Mass.—Levy v. Levy, 309 Mass. 486, 35 N.E.2d 659 (1941).

[FN7] Cal.—Balian v. Balian's Market, 48 Cal. App. 2d 150, 119 P.2d 426 (2d Dist. 1941).

[FN8] Ark.—Aycock v. Bottoms, 201 Ark. 104, 144 S.W.2d 43 (1940).

Cal.—Dandini v. Johnson, 193 Cal. App. 2d 815, 14 Cal. Rptr. 534 (1st Dist. 1961).

[FN9] Cal.—Monell v. College of Physicians and Surgeons of San Francisco, 198 Cal. App. 2d 38, 17 Cal. Rptr. 744 (1st Dist. 1961).

Particular transactions held not to create trust

Cal.—Lesh v. Lesh, 8 Cal. App. 3d 883, 87 Cal. Rptr. 632 (2d Dist. 1970).

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Trusts
John Bourdeau, J.D., Paul M. Coltoff, J.D., William H. Danne, Jr. J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., William Lindsley, J.D., Eric Mayer, J.D., Tom Muskus, J.D., and Eric C. Surette, J.D.

II. Creation, Existence, and Validity
A. Express Trusts
5. Acceptance or Declaration of Trust and Transfer of Title and Possession

Topic Summary References Correlation Table

§ 62. Acceptance by trustee

West's Key Number Digest

West's Key Number Digest, Trusts 🔑38

While an express trust cannot be imposed on one who does not accept it, as a general rule, the trustee's assent is not necessary in order to render the trust valid.

An express trust cannot be imposed on one who does not, expressly or by implication, accept it,[FN1] especially where the terms of the trust are such that the duties imposed are or may become burdensome.[FN2] An acceptance of the office by a trustee is necessary in order to constitute him or her trustee.[FN3]

Acceptance of a trust, created by will, deed, or other instrument, is ordinarily presumed[FN4] until the contrary is shown,[FN5] especially after a long lapse of time, even though the trustee may have done nothing in execution of the trust.[FN6] While an express acceptance of the trust is effective,[FN7] no formal acceptance is necessary.[FN8] Moreover, acceptance need not be manifested by express words.[FN9] It may be shown by words or actions or by both[FN10] and any conduct of the trustee indicating with reasonable certainty that he or she understood and accepted the terms of the trust is sufficient.[FN11] The acceptance may often be implied or established by inference,[FN12] as, for example, the result of accepting and retaining the trust deed,[FN13] voluntary interference with the trust property,[FN14] or, in general, acts relating to the control, management, or disposition of the subject matter of the trust.[FN15]

[FN1] Ark.—Lasley v. Bank of Northeast Arkansas, 4 Ark. App. 42, 627 S.W.2d 261 (1982).

Kan.—In re Ingram's Estate, 212 Kan. 218, 510 P.2d 597 (1973).

Mo.—Jarvis v. Boatmen's Nat. Bank of St. Louis, 478 S.W.2d 266 (Mo. 1972).

[FN2] Ohio—Reichert v. Mikesell, 73 Ohio App. 504, 29 Ohio Op. 160, 44 Ohio L. Abs. 257, 57 N.E.2d 160 (3d Dist. Van Wert County 1943).

[FN3] U.S.—Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982).

Kan.—Pizel v. Pizel, 7 Kan. App. 2d 388, 643 P.2d 1094 (1982).

[FN4] Ala.—Watson v. Watson, 283 Ala. 214, 215 So. 2d 290 (1968).

N.C.—Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969).

[FN5] Kan.—Pizel v. Pizel, 7 Kan. App. 2d 388, 643 P.2d 1094 (1982).

[FN6] La.—Jackson v. D'Aubin, 338 So. 2d 575 (La. 1976) (disavowed on other grounds by, Bartlett v. Calhoun, 412 So. 2d 597 (La. 1982)).

[FN7] Tex.—Lange v. Houston Bank & Trust Co., 194 S.W.2d 797 (Tex. Civ. App. Galveston 1946), writ refused n.r.e.

[FN8] Kan.—Rathbun v. Hill, 187 Kan. 130, 354 P.2d 338 (1960).

Pa.—In re Koziell's Trust, 412 Pa. 348, 194 A.2d 230 (1963).

[FN9] Ala.—Watson v. Watson, 283 Ala. 214, 215 So. 2d 290 (1968).

[FN10] Kan.—Rathbun v. Hill, 187 Kan. 130, 354 P.2d 338 (1960).

[FN11] Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

Nev.—In re Newman's Estate, 86 Nev. 151, 465 P.2d 616 (1970).

[FN12] N.J.—In re Land's Estate, 99 N.J. Super. 500, 240 A.2d 453 (Ch. Div. 1968).

[FN13] Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

[FN14] U.S.—Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982).

Mo.—In re Jackson's Will, 291 S.W.2d 214 (Mo. Ct. App. 1956).

[FN15] Ill.—Huffman v. Gould, 327 Ill. App. 428, 64 N.E.2d 773 (2d Dist. 1945).

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§ 63. Disclaimer by trustee

West's Key Number Digest

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While it is generally recognized that one who has accepted a trust may not at will disclaim or renounce it, in general, prior to acceptance, a person designated as trustee may renounce or disclaim the trust.

While it is generally recognized that one who has accepted a trust may not at will disclaim or renounce it,[FN1] in general, prior to acceptance, a person designated as trustee may renounce or disclaim the trust.[FN2] Formal disclaimer or renunciation is not necessary[FN3] although an informal disclaimer should be unequivocal.[FN4] Disclaimer may be shown or established by the conduct or acts of the person designated as trustee[FN5] or by nonaction long continued.[FN6] Thus, there is no acceptance of the trust property by a trustee if the trustee fails to assume any relationship with the subject matter of the trust.[FN7] Moreover, if the trustee treats the trust property as his or her own inconsistent with the duties imposed by the trust, the property is not accepted as trust property.[FN8]

An unnecessary delay to qualify by a person designated as a testamentary trustee may be sufficient to constitute a declination of the trust.[FN9] Notwithstanding some statutes requiring a testamentary trustee to give a bond, the failure of persons nominated as trustees to procure their formal appointment as trustees by the probate court and to give bonds does not conclusively show that they had declined to act in that capacity.[FN10]

The trustee's assent is not necessary in order to render a trust valid,[FN11] and the trustee's refusal to accept does not defeat the trust,[FN12] since equity will not allow a trust to fail for want of a trustee,[FN13] although a provision of a trust instrument which makes the operative effect dependent on the decision of the trustee may be given effect.[FN14]

[FN1] U.S.—Bird v. Stein, 102 F. Supp. 399 (S.D. Miss. 1952), judgment rev'd on other grounds, 204 F.2d 122 (5th Cir. 1953).

[FN2] N.C.—Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969).

Wis.—Sutherland v. Pierner, 249 Wis. 462, 24 N.W.2d 883 (1946).

[FN3] Nev.—In re Newman's Estate, 86 Nev. 151, 465 P.2d 616 (1970).

[FN4] Mass.—Daley v. Daley, 300 Mass. 17, 14 N.E.2d 113 (1938).

[FN5] Or.—In re Buelow's Estate, 177 Or. 218, 161 P.2d 909 (1945).

[FN6] Nev.—In re Newman's Estate, 86 Nev. 151, 465 P.2d 616 (1970).

Or.—In re Buelow's Estate, 177 Or. 218, 161 P.2d 909 (1945).

[FN7] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN8] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN9] Mass.—McMahon v. Krapf, 323 Mass. 118, 80 N.E.2d 314 (1948).

[FN10] Tex.—Smith v. Ricks, 308 S.W.2d 941 (Tex. Civ. App. Houston 1957), judgment aff'd, 159 Tex. 280, 318 S.W.2d 439 (1958) (overruled in part on other grounds by, Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961)).

[FN11] Mo.—First Nat. Bank of Kansas City v. Wheeler, 557 S.W.2d 639 (Mo. Ct. App. 1977).

Wash.—In re Bonness' Estate, 13 Wash. App. 299, 535 P.2d 823 (Div. 2 1975).

[FN12] U.S.—Fulk & Needham, Inc. v. U.S., 288 F. Supp. 39 (M.D. N.C. 1968), judgment aff'd, 411 F.2d 1403 (4th Cir. 1969).

Ga.—Simpson v. Anderson, 220 Ga. 155, 137 S.E.2d 638 (1964).

[FN13] § 302.

[FN14] Ohio—Reichert v. Mikesell, 73 Ohio App. 504, 29 Ohio Op. 160, 44 Ohio L. Abs. 257, 57 N.E.2d 160 (3d Dist. Van Wert County 1943).

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Topic Summary References Correlation Table

§ 64. Knowledge of, and acceptance and declination by, beneficiary

West's Key Number Digest

West's Key Number Digest, Trusts 39

It is not essential to the existence of a valid trust and the right of the beneficiary to enforce it that the beneficiary have knowledge thereof at the time of its creation or that the creator should notify the beneficiary of the existence of the trust.

It is not essential to the existence of a valid trust and the right of the beneficiary to enforce it that he or she have knowledge of it at the time of its creation[FN1] or that the creator should notify the beneficiary of the existence of the trust.[FN2] So it is not necessary that the beneficiary should consent to the creation of[FN3] or expressly accept[FN4] the trust. As a general rule, acceptance by the beneficiary will be presumed[FN5] because of the benefit derived by him or her under the trust.[FN6] Although notice is not essential to the existence of a trust, it is of great importance in determining the real intent of the alleged declarant.[FN7]

While, in the case of a spendthrift trust created by will, an attempted renunciation by the beneficiary is ineffective[FN8] and does not terminate the trust,[FN9] in general, property cannot be forced on a designated beneficiary against his or her will.[FN10] A beneficiary may reject or renounce the trust,[FN11] and any equitable rights arising from a declaration of trust are at an end after renunciation by the beneficiary.[FN12] However, the disclaimer must comply with the governing statute, and a letter written to the trustee on behalf of trust beneficiaries, and signed by others on the beneficiaries' behalf, is insufficient to disclaim the beneficiaries' interests in the trust under a state statute which requires that the disclaimer declare the disclaimer and extent thereof, be signed by the disclaimant, and be acknowledged in such a manner as would authorize a deed to be admitted to the record.[FN13] An elderly spouse may be competent to renounce a testamentary trust even though he or she suffers from degenerative dementia.[FN14]

Acceptance[FN15] or repudiation[FN16] of the trust by the beneficiary when he or she learns of the trust relates back to the date of the declaration.

[FN1] U.S.—Davidson v. Blaustein, 247 F. Supp. 225 (D. Md. 1965).

Ohio—Thomas v. Dye, 66 Ohio L. Abs. 391, 117 N.E.2d 515 (C.P. 1953), judgment rev'd on other grounds, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 2d Dist. Franklin County 1954).

[FN2] Idaho—Vaughan v. First Federal Sav. & Loan Ass'n, 85 Idaho 266, 378 P.2d 820 (1963).

Mass.—Cooney v. Montana, 347 Mass. 29, 196 N.E.2d 202 (1964).

[FN3] Cal.—Silver v. Shemanski, 89 Cal. App. 2d 520, 201 P.2d 418 (2d Dist. 1949).

[FN4] Cal.—Silver v. Shemanski, 89 Cal. App. 2d 520, 201 P.2d 418 (2d Dist. 1949).

Kan.—Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973).

[FN5] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Kan.—Pizel v. Pizel, 7 Kan. App. 2d 388, 643 P.2d 1094 (1982).

[FN6] Md.—Citizens' Nat. Bank of Pocomoke City v. Parsons, to Use of Worth, 167 Md. 631, 175 A. 852 (1934).

[FN7] Del.—Delaware Trust Co. v. Fitzmaurice, 27 Del. Ch. 101, 31 A.2d 383 (1943), decree modified on other grounds, 27 Del. Ch. 374, 38 A.2d 463 (1944).

Mass.—Berger v. Berger, 333 Mass. 540, 132 N.E.2d 179 (1956).

[FN8] Ariz.—First Nat. Bank of Ariz. v. Taylor, 5 Ariz. App. 327, 426 P.2d 663 (1967), opinion supplemented on denial of reh'g, 5 Ariz. App. 422, 427 P.2d 556 (1967).

N.Y.—In re Singer's Estate, 33 Misc. 2d 70, 224 N.Y.S.2d 577 (Sur. Ct. 1962).

[FN9] § 120.

[FN10] Va.—Blackwell v. Virginia Trust Co., 177 Va. 299, 14 S.E.2d 301 (1941).

[FN11] Del.—Bank of Delaware v. Clark, 249 A.2d 442 (Del. Ch. 1968).

N.Y.—In re Pomeroy's Will, 74 Misc. 2d 953, 345 N.Y.S.2d 848 (Sur. Ct. 1973).

Tex.—Aberg v. First Nat. Bank in Dallas, 450 S.W.2d 403 (Tex. Civ. App. Dallas 1970), writ refused n.r.e., (May 20, 1970).

As to termination of trust by beneficiary, see § 121.

A.L.R. Library

Beneficiary's right to disclaim or renounce spendthrift trust prior to acceptance, 14 A.L.R.3d 1437.

[FN12] U.S.—Stoehr v. Miller, 296 F. 414 (C.C.A. 2d Cir. 1923).

[FN13] W.Va.—Daniel v. United Nat. Bank, 202 W. Va. 648, 505 S.E.2d 711 (1998).

[FN14] Neb.—In re Estate of Disney, 250 Neb. 703, 550 N.W.2d 919 (1996).

[FN15] U.S.—Stoehr v. Miller, 296 F. 414 (C.C.A. 2d Cir. 1923).

[FN16] U.S.—Stoehr v. Miller, 296 F. 414 (C.C.A. 2d Cir. 1923).

N.H.—Bradley v. State, 100 N.H. 232, 123 A.2d 148 (1956).

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§ 65. Knowledge of, and acceptance and declination by, beneficiary—Bank deposits

West's Key Number Digest

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Although there is authority to the contrary, in respect of a deposit in the name of the depositor in trust for another, or in the name of the depositor or creator and the beneficiary, knowledge on the part of the beneficiary of the fact of the deposit is not necessary to create a trust, and it is not essential that the beneficiary express an acceptance of the trust or deposit.

With respect to deposits in the name of the depositor in trust for another, some courts have held that communication of the fact of the deposit to the beneficiary is usually necessary evidence of the creation of the trust.[FN1] On the other hand, other courts hold that, in the case of a deposit in the name of the depositor in trust for another, knowledge on the part of the beneficiary,[FN2] or the depositor's notice to the beneficiary,[FN3] of the fact of the deposit is not necessary to create, or to evidence the existence of, a trust. So, also, knowledge on the part of the beneficiary is not necessary in the case of a deposit in the name of the depositor or creator and the beneficiary.[FN4] It is not essential to the validity of a trust in savings bank deposits that the beneficiary express an acceptance of it,[FN5] and where the beneficiary knows of the deposit, especially by the trustee's express announcement, he or she is entitled to it.[FN6]

[FN1] Mass.—Day Trust Co. v. Malden Sav. Bank, 328 Mass. 576, 105 N.E.2d 363 (1952).

[FN2] N.J.—Hickey v. Kahl, 129 N.J. Eq. 233, 19 A.2d 33 (Ch. 1941).

N.Y.—Haber v. Haber, 214 N.Y.S.2d 134 (Sup 1961).

[FN3] Cal.—Sherman v. Hibernia Savings & Loan Soc., 129 Cal. App. Supp. 795, 20

P.2d 138 (App. Dep't Super. Ct. 1933).

[FN4] Md.—Kornmann v. Safe Deposit & Trust Co. of Baltimore, 180 Md. 270, 23 A.2d 692 (1942).

[FN5] Cal.—Sherman v. Hibernia Savings & Loan Soc., 129 Cal. App. Supp. 795, 20 P.2d 138 (App. Dep't Super. Ct. 1933).

Receipt of interest payments on trust account as acceptance

Cal.—Kropp v. Sterling Sav. & Loan Assn., 9 Cal. App. 3d 1033, 88 Cal. Rptr. 878 (4th Dist. 1970).

[FN6] Mass.—Mikshis v. Palionis, 345 Mass. 316, 187 N.E.2d 147 (1963).

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§ 66. Transfer of title or interest

West's Key Number Digest

West's Key Number Digest, Trusts 31

Before property can be said to be held in trust by the trustee, the trustee must have legal title.

By definition, the creation of a trust must involve a conveyance of property,[FN1] and before property can be said to be held in trust by the trustee, the trustee must have legal title.[FN2] To establish a valid express trust inter vivos, there must be actual delivery of the corpus, its character considered or a legal assignment of the same to the trustee actually conveying present title to the trustee.[FN3] Thus, to create an enforceable trust, it is necessary that the donor or creator part with his or her interest in the property[FN4] to the trustee[FN5] by an actual[FN6] conveyance or transfer.[FN7] Aside from the situation in which a settlor of a trust declares himself or herself trustee, separation of the legal and equitable interests must come about through a transfer of the trust property to the trustee.[FN8] Indeed, for a trust to be a trust, legal title of the trust property must immediately pass to the trustee, and the beneficial or equitable interest to the beneficiaries.[FN9] In order to create a trust fund, the fund must be set aside either actually or constructively,[FN10] and the fund or other property must be so designated as to permit the passing of title to the trustee.[FN11] The trustor's transfer of title must be done before his or her death in order to become part of the trust estate.[FN12]

While some courts have held that no transfer of legal title to property is required to create a valid trust when the settlor and trustee are the same person,[FN13] other courts have held that where the settlor has retained legal title to the property in himself or herself, it is essential that equitable title to the property must pass immediately and unconditionally.[FN14] If there is a retention of title by the owner, it must be under circumstances which unequivocally disclose an intent to hold it for the use of another.[FN15] Where the settlor declares himself or herself as trustee for the benefit of another, legal title is not really transferred to the trustee,

but the settlor is merely separating legal title from equitable title.[FN16] An inter vivos trust cannot arise when the settlor retains both a full equitable interest and legal title in the trust property, since the essential character of the trust is that the settlor effects a separation of these interests in the trust property.[FN17] This means that the same person cannot at the same time, as trustee, possess the entire legal title and, as beneficiary, the entire equitable title.[FN18] In some jurisdictions at least, a person may hold as trustee for himself or herself and for others.[FN19] Where the owner of property also is trustee for another, there must be a complete transfer of the equitable title to the property to the beneficiary.[FN20] Transfer documents help to prove that the settlor intended to create a trust.[FN21]

[FN1] Wyo.—Jewish Community Ass'n of Casper v. Community First Nat. Bank, 6 P.3d 1264 (Wyo. 2000).

[FN2] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN3] Mo.—In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009).

[FN4] Del.—Bothe v. Dennie, 324 A.2d 784 (Del. Super. Ct. 1974).

N.Y.—Matter of Wesolowski's Estate, 83 Misc. 2d 518, 372 N.Y.S.2d 861 (Sur. Ct. 1975).

N.C.—Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972).

[FN5] Mont.—McCormick v. Brevig, 1999 MT 86, 294 Mont. 144, 980 P.2d 603 (1999).

Tex.—Wilkerson v. McClary, 647 S.W.2d 79 (Tex. App. Beaumont 1983).

Legal title

When a trust is created, it is necessary that legal title to the "res," the actual, existing property, immediately pass to the trustee.

Ohio—Kessler v. Totus Tuus, L.L.C., 185 Ohio App. 3d 240, 2009-Ohio-6376, 923 N.E.2d 1160 (11th Dist. Ashtabula County 2009), appeal not allowed, 124 Ohio St. 3d 1541, 2010-Ohio-1557, 924 N.E.2d 844 (2010).

[FN6] Colo.—Estate of Brenner, 37 Colo. App. 271, 547 P.2d 938 (App. 1976).

Or.—Masquart v. Dick, 210 Or. 459, 310 P.2d 742 (1957).

[FN7] U.S.—In re Snider Bros., Inc., 12 B.R. 87 (Bankr. D. Mass. 1981).

Ind.—Leazenby v. Clinton County Bank & Trust Co., 171 Ind. App. 243, 355 N.E.2d 861 (1976).

N.Y.—Matter of Gagliardi's Estate, 82 A.D.2d 956, 440 N.Y.S.2d 775 (3d Dep't 1981), order aff'd, 55 N.Y.2d 109, 447 N.Y.S.2d 902, 432 N.E.2d 774 (1982).

Quitclaim deed

Tex.—Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343 (Tex. Civ. App. Austin 1973), writ refused n.r.e., (July 18, 1973).

Warranty deed that did not name beneficiaries held to be valid conveyance

Wyo.—Matter of Estate of Lohrie, 950 P.2d 1030 (Wyo. 1997).

Conditional conveyance not creating trust

Wash.—In re 1934 Deed to Camp Kilworth, 149 Wash. App. 82, 201 P.3d 416 (Div. 2 2009), review denied, 166 Wash. 2d 1021, 217 P.3d 335 (2009).

[FN8] Mont.—McCormick v. Brevig, 1999 MT 86, 294 Mont. 144, 980 P.2d 603 (1999).

Va.—Ballard v. McCoy, 247 Va. 513, 443 S.E.2d 146 (1994).

[FN9] Tex.—Shearrer v. Holley, 952 S.W.2d 74 (Tex. App. San Antonio 1997).

[FN10] Ark.—Aycock v. Bottoms, 201 Ark. 104, 144 S.W.2d 43 (1940).

Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

[FN11] Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

Pa.—In re Refior, 160 Pa. Super. 305, 50 A.2d 523 (1947).

[FN12] Nev.—Dahlgren v. First Nat. Bank of Nevada, 94 Nev. 387, 580 P.2d 478 (1978).

[FN13] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN14] Mo.—Coon v. Stanley, 230 Mo. App. 524, 94 S.W.2d 96 (1936).

[FN15] Mo.—In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009).

[FN16] Ala.—Coosa River Water, Sewer and Fire Protection Authority v. SouthTrust Bank of Alabama, N.A., 611 So. 2d 1058 (Ala. 1993).

[FN17] Va.—Ballard v. McCoy, 247 Va. 513, 443 S.E.2d 146 (1994).

[FN18] N.C.—Blades v. Norfolk Southern Ry. Co., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 (1944).

[FN19] §§ 296, 297.

[FN20] U.S.—Bingen v. First Trust Co. of St. Paul, 103 F.2d 260 (C.C.A. 8th Cir. 1939).

[FN21] Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

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§ 67. Delivery of trust instrument or declaration

West's Key Number Digest

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While under certain conditions, delivery to the trustee of the trust instrument may be a necessary element of a complete trust, it has been held that there is no need of delivery, and the instrument creating the trust need not be delivered to the beneficiary or anyone else in order to be effective.

While some courts have held that, under certain conditions, delivery to the trustee of the trust instrument executed by the creator is a necessary element of a complete trust,[FN1] other courts have held that there is no need of delivery,[FN2] and the instrument creating the trust need not be delivered to the beneficiary[FN3] or anyone[FN4] in order to be effective. Delivery is largely a matter of the intent of the donor or trustor and is a question of fact to be determined from the surrounding circumstances.[FN5] Manual delivery is unnecessary and is of but little legal significance where a binding agreement is signed by both the creator and trustee.[FN6] The trustee's written acceptance of the terms and provisions of a trust agreement constitutes sufficient delivery.[FN7] In some jurisdictions, the lack of acknowledgement of delivery and failure to record a trust instrument generally prevent the trust from taking effect.[FN8]

Where the subject of the trust is real property, title to it can be vested only by a deed of conveyance.[FN9] While the necessity for the delivery and acceptance of the trust deed has been recognized,[FN10] the trustee need not receive or have physical possession of the deed, and any acts or words which clearly manifest the trustor's intention to consummate the deed and to part unconditionally with it and with all control over it are sufficient to constitute delivery from which acceptance may be implied.[FN11]

[FN1] U.S.—Shiro v. Drew, 174 F. Supp. 495 (D. Me. 1959).

Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

Mo.—Masterson v. Plummer, 343 S.W.2d 352 (Mo. Ct. App. 1961).

[FN2] Mass.—Greeley v. Flynn, 310 Mass. 23, 36 N.E.2d 394 (1941).

Ohio—Thomas v. Dye, 66 Ohio L. Abs. 391, 117 N.E.2d 515 (C.P. 1953), judgment rev'd on other grounds, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 2d Dist. Franklin County 1954).

[FN3] Del.—Bodley v. Jones, 27 Del. Ch. 273, 32 A.2d 436 (1943).

Okla.—Burns v. Bastien, 1935 OK 886, 174 Okla. 40, 50 P.2d 377 (1935).

[FN4] N.J.—Matter of Catanio, 306 N.J. Super. 439, 703 A.2d 988 (App. Div. 1997).

[FN5] Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

[FN6] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

[FN7] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

[FN8] Miss.—Alvarez v. Coleman, 642 So. 2d 361 (Miss. 1994).

As to necessity of the delivery of a writing to satisfy the statute of frauds, see C.J.S., Frauds, Statute of § 113.

[FN9] Tex.—National Bank of Commerce of Houston v. Dunn, 381 S.W.2d 654 (Tex. Civ. App. Houston 1964), writ refused n.r.e.

[FN10] Md.—Buchwald v. Buchwald, 175 Md. 115, 199 A. 800 (1938).

[FN11] Ky.—Hinton's Ex'r v. Hinton's Committee, 256 Ky. 345, 76 S.W.2d 8 (1934).

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II. Creation, Existence, and Validity
A. Express Trusts
5. Acceptance or Declaration of Trust and Transfer of Title and Possession

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§ 68. Delivery and possession of property

West's Key Number Digest

West's Key Number Digest, Trusts 37.5

Subject to the rule that the donor who constitutes himself or herself trustee may retain possession and control of the property as trustee, the owner must surrender control of the property which the owner has subjected to the alleged trust, and there should either be delivery to the trustee or the equivalent of delivery, although there is also authority for the view that delivery is not essential.

Although the policy of the law in requiring delivery to effect a transfer in certain instances may not be evaded by merely calling the transaction a declaration of a trust,[FN1] if the creator of the trust by appropriate words or acts fully and completely constitutes himself or herself trustee, no change of possession is necessary,[FN2] and he or she may also retain possession of the instrument creating the trust[FN3] and need not deliver it to the beneficiary.[FN4] On the other hand, where the creator has never informed the beneficiaries of it, a voluntary trust cannot be created where the creator has attempted to make himself or herself trustee and has kept the property, subject to his or her own disposal.[FN5]

Subject to the rule recognized in some jurisdictions that the creator of a trust may reserve the right to revoke the trust,[FN6] and the rule that the donor or creator who constitutes himself or herself trustee may retain possession and control of the property as trustee, there must be an actual delivery of the trust fund or property, with the intention of vesting legal title in the trustee.[FN7] Indeed, there is authority for the view that no trust is created where control of the property remains with the alleged creator although the property is in the possession of another.[FN8]

Although there is authority for the view that delivery of the trust property is not essential,[FN9] generally, in order to create a completed trust in personal property, there should

either be delivery to the trustee or the equivalent of delivery.[FN10] Where one other than the donor is selected as trustee of a voluntary trust, there must be such a delivery of the property as constitutes a relinquishment of dominion over the property by the donor,[FN11] and as will be effectual to transfer the legal title.[FN12] As sometimes expressed, there must be actual delivery of the fund or other property or of a legal assignment thereof to the trustee, with the intention of passing legal title to him or her as trustee.[FN13] However, transfer is not required and the transfer of the property is sufficient if it is made to a third person for the trustee under such circumstances that the donor no longer has any dominion over the property, or if a sufficient declaration is made by the transferee that he or she holds the property in trust for another.[FN14]

Usually, the manifestation of the settlor's intent that a trust take effect immediately is evidenced by delivery to the trustees of the subject matter of the trust or some act or instrument indicating the settlor's relinquishment of dominion over the property.[FN15] While possession by the trustee of personal property involved is essential to the creation of a trust,[FN16] a failure of the trustee to take actual physical control of the trust property does not defeat the trust, where title is effectually vested in him or her by a written instrument.[FN17] Where actual delivery is impossible, the formal execution and delivery of an instrument purporting to be a present complete transfer and assignment of such property to a person as trustee is a sufficient delivery of the property therein described to make the transaction an executed, as distinguished from an executory, one.[FN18]

The trust may, however, remain incomplete until the property constituting the corpus of the trust is delivered to the trustee.[FN19] In general, the placing of securities in a safe deposit box does not, of itself, constitute delivery where the alleged trustee is not given the right of access to such box.[FN20] However, where the instrument creating the trust expressly provides that it shall be for the benefit of the grantor during his or her life, a retention of possession by him or her is not inconsistent with the trust.[FN21]

Where, prior to the creation of the trust, the property is in the hands of the trustee, no formal delivery of the property is required.[FN22]

[FN1] Mo.—State ex rel. Union Nat. Bank of Springfield v. Blair, 350 Mo. 622, 166 S.W.2d 1085 (1942).

[FN2] U.S.—Coleman v. Golkin, Bomback & Co., Inc., 562 F.2d 166 (2d Cir. 1977).

Alaska—Aiello v. Clark, 680 P.2d 1162 (Alaska 1984).

Ariz.—Barnette v. McNulty, 21 Ariz. App. 127, 516 P.2d 583 (Div. 2 1973).

[FN3] U.S.—Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 (C.C.A. 8th Cir. 1937).

Mass.—Rock v. Rock, 309 Mass. 44, 33 N.E.2d 973 (1941).

[FN4] N.Y.—In re Brown's Will, 252 N.Y. 366, 169 N.E. 612 (1930).

[FN5] Ohio—Hoffman v. Vetter, 117 Ohio App. 233, 24 Ohio Op. 2d 1, 192 N.E.2d 249 (9th Dist. Wayne County 1962).

[FN6] §§ 107, 109.

[FN7] N.Y.—In re Doman, 68 A.D.3d 862, 890 N.Y.S.2d 632 (2d Dep't 2009).

[FN8] Fla.—Lane v. Palmer First Nat. Bank & Trust Co. of Sarasota, 213 So. 2d 301 (Fla. Dist. Ct. App. 2d Dist. 1968).

Ill.—Rudolph v. Gersten, 100 Ill. App. 2d 253, 241 N.E.2d 600 (1st Dist. 1968).

N.Y.—In re Fontanella's Estate, 33 A.D.2d 29, 304 N.Y.S.2d 829 (3d Dep't 1969).

[FN9] Md.—Trosch v. Maryland Nat. Bank, 32 Md. App. 249, 359 A.2d 564 (1976).

Mass.—Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748, 168 A.L.R. 1321 (1946).

[FN10] U.S.—Johnson v. England, 356 F.2d 44 (9th Cir. 1966).

Cal.—Cohen v. Meyers, 6 Cal. App. 3d 878, 86 Cal. Rptr. 456 (2d Dist. 1970).

Kan.—Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973).

Conveyance with donative intent

R.I.—Pezza v. Pezza, 690 A.2d 345 (R.I. 1997).

[FN11] Nev.—Gardella v. Santini, 65 Nev. 215, 193 P.2d 702 (1948).

Okla.—Ratcliff v. Lee, 1948 OK 96, 200 Okla. 253, 192 P.2d 843 (1948).

[FN12] Minn.—Cooney v. Equitable Life Assur. Soc. of U.S., 235 Minn. 377, 51 N.W.2d 285 (1952).

[FN13] N.Y.—In re Fontanella's Estate, 33 A.D.2d 29, 304 N.Y.S.2d 829 (3d Dep't 1969).

[FN14] Conn.—Linahan v. Linahan, 131 Conn. 307, 39 A.2d 895 (1944).

[FN15] Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

[FN16] Colo.—Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956).

[FN17] Ky.—Hardin's Committee v. Shelman, 245 Ky. 508, 53 S.W.2d 923 (1932).

[FN18] U.S.—Smith v. James Irvine Foundation, 277 F. Supp. 774 (C.D. Cal. 1967), judgment aff'd, 402 F.2d 772, 12 Fed. R. Serv. 2d 1096 (9th Cir. 1968).

[FN19] N.Y.—In re Rivas' Trust, 100 N.Y.S.2d 357 (Sup 1950).

[FN20] Ohio—Moll v. Moll, 109 Ohio App. 393, 11 Ohio Op. 2d 283, 166 N.E.2d 531 (2d Dist. Montgomery County 1959).

[FN21] Alaska—Aiello v. Clark, 680 P.2d 1162 (Alaska 1984).

As to secret trust for grantor as badge of fraud, see C.J.S., Fraudulent Conveyances § 142.

[FN22] Mass.—Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945) (abrogated on other grounds by, Sullivan v. Burkin, 390 Mass. 864, 460 N.E.2d 572 (1984)).

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§ 69. Admissibility

West's Key Number Digest

West's Key Number Digest, Trusts 42

Evidence of the acts and declarations, either oral or written, of the parties and the surrounding circumstances may be admitted to show the existence or nonexistence of a trust and to establish its nature, purpose, and terms, or the beneficiary therein, but incompetent or irrelevant evidence is inadmissible.

Subject to the limitations imposed by the statute of frauds and the general rules as to the competency of evidence, an express trust may be proved not only by express declarations but also by circumstances from which its existence may be inferred.[FN1] To this end, evidence of all the facts and circumstances surrounding the parties at the time of the making of a contract, which are necessary to be known to understand their conduct and motives or to weigh the reasonableness of their contentions, is ordinarily relevant and admissible.[FN2] So evidence of the acts and declarations, either oral or written, of the parties, as well as the surrounding circumstances, may be admitted to show the existence[FN3] or nonexistence[FN4] of a trust and to establish its nature, purpose, and terms.[FN5] It is not essential that proof to establish a trust be made by witnesses who have no interest in the case.[FN6]

Evidence should be excluded where it has no bearing on the issue of the existence of a trust,[FN7] or where, under the general rules of evidence, it is incompetent,[FN8] as where it consists of mere declarations of a grantor made after he or she has parted with all interest in the property.[FN9] Indeed, once the trust is established, the settlor's declarations in derogation of the trust are immaterial unless they rise to the level of revocation.[FN10] So declarations of one who deposits money in a bank under circumstances raising the presumption of a trust are incompetent, if made after the deposit, to show that the depositor did not intend to create a trust.[FN11] The beneficiary cannot introduce his or her own declarations to establish the

trust.[FN12]

[FN1] Cal.—Adams v. Young, 255 Cal. App. 2d 145, 62 Cal. Rptr. 877 (2d Dist. 1967).

Ky.—Wilson v. St. Clair, 286 S.W.2d 554 (Ky. 1955).

As to parol trusts and effect of statute of frauds, generally, see §§ 27 to 37.

[FN2] U.S.—Wolff v. Calla, 288 F. Supp. 891 (E.D. Pa. 1968).

Md.—Levin v. Security Financial Ins. Corp., 246 Md. 712, 230 A.2d 93 (1967).

Evidence held admissible

Mass.—Carpenter v. Suffolk Franklin Sav. Bank, 362 Mass. 770, 291 N.E.2d 609 (1973).

[FN3] Cal.—Ensher, Alexander & Barsoom, Inc. v. Ensher, 210 Cal. App. 2d 184, 26 Cal. Rptr. 381 (3d Dist. 1962).

Miss.—Coney v. Coney, 249 Miss. 561, 163 So. 2d 692 (1964).

Or.—Gilfry v. Gilfry, 248 Or. 358, 434 P.2d 348 (1967).

[FN4] Ill.—In re Petralia's Estate, 48 Ill. App. 2d 122, 198 N.E.2d 200 (1st Dist. 1964), judgment aff'd, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

Miss.—Coney v. Coney, 249 Miss. 561, 163 So. 2d 692 (1964).

[FN5] N.C.—Wilmington Furniture Co. v. Cole, 207 N.C. 840, 207 N.C. 847, 178 S.E. 579 (1935).

[FN6] Ark.—Blalock v. Blalock, 222 Ark. 299, 258 S.W.2d 891 (1953).

[FN7] Ga.—Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961) (overruled in part on other grounds by, Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982)).

Ohio—Morrison v. Morrison, 99 Ohio App. 203, 58 Ohio Op. 361, 132 N.E.2d 233 (6th Dist. Lucas County 1955).

[FN8] Mass.—Berger v. Berger, 333 Mass. 540, 132 N.E.2d 179 (1956).

N.Y.—Shapiro v. Ridgewood Sav. Bank, 28 Misc. 2d 73, 213 N.Y.S.2d 408 (Sup 1961).

As to competency of evidence, generally, see C.J.S., Evidence §§ 349 to 364.

[FN9] Ohio—Thomas v. Dye, 70 Ohio L. Abs. 118, 127 N.E.2d 228 (Ct. App. 2d Dist. Franklin County 1954).

[FN10] Cal.—Brucks v. Home Federal Sav. & Loan Ass'n, 36 Cal. 2d 845, 228 P.2d 545 (1951).

Kan.—Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 (1996).

[FN11] N.Y.—In re Ryan's Will, 52 N.Y.S.2d 502 (Sur. Ct. 1944).

[FN12] Tex.—Best Inv. Co. v. Hernandez, 479 S.W.2d 759 (Tex. Civ. App. Dallas 1972), writ refused n.r.e., (Oct. 4, 1972).

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§ 70. Admissibility—Parol evidence

West's Key Number Digest

West's Key Number Digest, Trusts 43, 43(1) to 43(3)

Where an agreement purporting or relied on to create a trust is reduced to writing, parol evidence is not admissible to vary, add to, or contradict the written instrument if such instrument is complete and free from ambiguity, but parol evidence of the circumstances surrounding the execution of the agreement may be received where such evidence does not vary or contradict the instrument.

Where an agreement purporting or relied on to create a trust is reduced to writing, parol evidence is not admissible to vary, add to, or contradict the written instrument,[FN1] if such instrument is complete[FN2] and free from ambiguity.[FN3] Hence, parol evidence cannot be used to prove an express trust of land when it is used to supply terms that are wholly absent.[FN4] Parol evidence, however, is admissible to explain an ambiguity in such an instrument,[FN5] and parol evidence of the circumstances surrounding the execution of an agreement may be received, where such evidence does not vary or contradict the instrument, but affirms it and shows the reason for its execution.[FN6] So where the existence of a trust is clearly established by a writing, parol evidence is admissible to make clear its nature, purpose, and terms,[FN7] or to explain the position of the parties.[FN8] Moreover, the parol evidence rule does not apply where the exclusion of such evidence would result in fraud,[FN9] or where it is sought to show that the consideration named in a deed did not pass.[FN10] Since a trust in personalty may be created by parol,[FN11] parol evidence is admissible to supply the purpose of such a trust which is not stated in the instrument declaring it.[FN12] However, the purported beneficiaries to a trust cannot prove their status through parol evidence where no beneficiaries at all were mentioned in the signed document that purportedly attempted to create a trust of land.[FN13]

If the owner of property makes an inter vivos transfer by written instrument which declares that the transferee is to take property for his or her own benefit, then, absent the proper grounds for rescission or reformation, the parol evidence rule will bar extrinsic evidence that the transferee was intended to hold the property in trust.[FN14] However, if the instrument does not declare that the transferee is to take property either for his or her own benefit or in trust, then extrinsic evidence may be admitted to show how the transferee was intended to hold the property.[FN15]

The purpose and intent of a parol trust may be shown by parol evidence.[FN16] Where there has been part performance of an express parol trust, evidence of the parol trust is proper and competent.[FN17]

[FN1] Ala.—Osborn v. Empire Life Ins. Co. of America, 342 So. 2d 763 (Ala. 1977).

N.C.—Tomlinson v. Brewer, 18 N.C. App. 696, 197 S.E.2d 901 (1973).

Tex.—Best Inv. Co. v. Hernandez, 479 S.W.2d 759 (Tex. Civ. App. Dallas 1972), writ refused n.r.e., (Oct. 4, 1972).

[FN2] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

[FN3] Del.—Lewis v. Hanson, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Tex.—Messer v. Johnson, 422 S.W.2d 908 (Tex. 1968).

[FN4] Ark.—Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 (1992).

[FN5] Cal.—Perkins v. Maiden, 57 Cal. App. 2d 46, 134 P.2d 30 (1st Dist. 1943).

Minn.—In re Bush's Trust, 249 Minn. 36, 81 N.W.2d 615 (1957).

[FN6] Iowa—Ross v. Ross, 256 Iowa 326, 126 N.W.2d 369 (1964).

Tex.—Gause v. Gause, 430 S.W.2d 409 (Tex. Civ. App. Austin 1968).

Wis.—Hoffmann v. Wausau Concrete Co., 58 Wis. 2d 472, 207 N.W.2d 80 (1973).

[FN7] U.S.—In re Clemens, 472 F.2d 939, 66 Ohio Op. 2d 149 (6th Cir. 1972).

Md.—Shaffer v. Lohr, 264 Md. 397, 287 A.2d 42 (1972).

[FN8] Conn.—Linahan v. Linahan, 131 Conn. 307, 39 A.2d 895 (1944).

Ind.—Hinds v. McNair, 235 Ind. 34, 129 N.E.2d 553 (1955).

[FN9] Tex.—Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. Civ. App. Amarillo

1923), writ dismissed w.o.j., (Oct. 17, 1923).

[FN10] Okla.—Gammel v. Enochs, 1960 OK 162, 353 P.2d 1106 (Okla. 1960).

[FN11] § 28.

[FN12] Cal.—Monell v. College of Physicians and Surgeons of San Francisco, 198 Cal. App. 2d 38, 17 Cal. Rptr. 744 (1st Dist. 1961).

Fla.—Rosen v. Rosen, 167 So. 2d 70 (Fla. Dist. Ct. App. 3d Dist. 1964).

[FN13] Ark.—Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 (1992).

[FN14] Neb.—Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

[FN15] Neb.—Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

N.C.—Tomlinson v. Brewer, 18 N.C. App. 696, 197 S.E.2d 901 (1973).

[FN16] Mass.—Porreca v. Gaglione, 358 Mass. 365, 265 N.E.2d 348 (1970).

Neb.—Eden v. Eden, 182 Neb. 768, 157 N.W.2d 543 (1968).

Or.—City of Medford v. Bessonette, 255 Or. 53, 463 P.2d 865 (1970).

[FN17] Ariz.—Stewart v. Damron, 63 Ariz. 158, 160 P.2d 321 (1945).

As to express parol trust taken out of statute of frauds by part performance, generally, see § 30.

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§ 71. Weight and sufficiency

West's Key Number Digest

West's Key Number Digest, Trusts 44, 44(1) to 44(3)

According to some, but not all, authorities, something more than a mere preponderance of evidence is necessary to establish a parol trust in land, and in order to establish a trust either in land or personalty, the evidence must be clear, convincing, and satisfactory, but the proof need not be uncontradicted.

The degree or quality of proof necessary to establish a trust or the settlor's intent to create a trust, either in land or personalty, has variously been expressed by the use of the terms "clear"[FN1] or "clear and convincing";[FN2] while in other cases, use has been made of the terms "clear and satisfactory";[FN3] "clear, convincing, and satisfactory";[FN4] "clear, convincing, and unequivocal";[FN5] "clear, cogent, and convincing";[FN6] "reasonably clear and certain";[FN7] and other similar or equivalent expressions.[FN8] While a strong showing is required to prove an oral trust, the application of the rule does not require as great an amount of proof where the trustee is not seeking a decree adverse to the beneficiary.[FN9] The proof to establish a trust need not be uncontradicted.[FN10]

The requirement that the evidence be clear and satisfactory, clear and convincing, and so forth applies not only to proof of the existence of the trust but also to the establishment of its terms and conditions[FN11] and is especially applicable where the trust is attempted to be proved by parol evidence where such evidence is admissible for that purpose,[FN12] or where it is sought to convert into a trustee a person holding the legal title to property ostensibly as absolute owner.[FN13] The rule also has special application after the lapse of a great length of time,[FN14] or where some of the parties to the alleged trust are deceased.[FN15]

An express trust cannot be established by vague and uncertain evidence or loose, equivoc-

al, and indefinite declarations,[FN16] and while declarations and admissions may be considered and given weight, they should be received with great caution.[FN17]

Something more than a mere preponderance of the evidence is required to show a parol trust in land,[FN18] or at least that a superior measure of proof is necessary,[FN19] as, for instance, strong, cogent, and convincing evidence.[FN20] In order to establish a trust by parol, the evidence must be so clear and convincing as to lead to but one conclusion,[FN21] and some of the cases go to the extent of requiring that the evidence be so clear and convincing as to show the existence of a trust beyond a doubt[FN22] or a reasonable doubt.[FN23] However, some courts have held that a preponderance of the evidence is sufficient to establish a parol trust in land if it clearly and definitely attests to the facts which give rise to the trust asserted.[FN24]

The interest of a witness may be considered in determining whether or not the testimony is clear, satisfactory, and convincing.[FN25] The testimony of one witness may be sufficient to establish an express trust,[FN26] but the courts have also held that the testimony of one witness without other corroborating circumstances should not be held sufficient to prove an express trust.[FN27] A jury finding that an order establishing a testamentary trust existed may properly be supported by an attorney's testimony that the order was signed and filed and evidence that assets were transferred to the trust even though the order cannot be found and the attorney is a convicted felon.[FN28]

[FN1] Cal.—Crocker-Citizens National Bank v. Younger, 4 Cal. 3d 202, 93 Cal. Rptr. 214, 481 P.2d 222, 56 A.L.R.3d 1228 (1971).

[FN2] Ark.—Thom v. Geyer, 254 Ark. 716, 497 S.W.2d 689 (1973).

D.C.—In re Estate of Tuthill, 754 A.2d 272 (D.C. 2000).

[FN3] Mich.—Martin v. Martin, 37 Mich. App. 208, 194 N.W.2d 552 (1971).

[FN4] Ark.—Moore v. Lawrence, 252 Ark. 759, 480 S.W.2d 941 (1972).

Neb.—Eden v. Eden, 182 Neb. 768, 157 N.W.2d 543 (1968).

[FN5] N.Y.—In re Bourne's Estate, 38 Misc. 2d 838, 238 N.Y.S.2d 816 (Sur. Ct. 1963).

[FN6] Mo.—Gardner v. Bernard, 401 S.W.2d 415 (Mo. 1966).

N.C.—Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

[FN7] Tex.—Gause v. Gause, 430 S.W.2d 409 (Tex. Civ. App. Austin 1968).

[FN8] N.C.—Wells v. Dickens, 274 N.C. 203, 162 S.E.2d 552 (1968).

Tenn.—Linder v. Little, 490 S.W.2d 717 (Tenn. Ct. App. 1972).

[FN9] Fla.—Wimmers v. Blackburn, 151 Fla. 236, 9 So. 2d 505 (1942).

[FN10] Tex.—Suda v. Vaughan, 285 S.W.2d 837 (Tex. Civ. App. Beaumont 1955).

[FN11] Ill.—Clemens v. Sandee Mfg. Co., 114 Ill. App. 2d 322, 252 N.E.2d 897 (1st Dist. 1969).

[FN12] Cal.—Monell v. College of Physicians and Surgeons of San Francisco, 198 Cal. App. 2d 38, 17 Cal. Rptr. 744 (1st Dist. 1961).

Ill.—Strilky v. Levy, 33 Ill. App. 2d 91, 178 N.E.2d 694 (1st Dist. 1961).

[FN13] Cal.—Spaulding v. Jones, 117 Cal. App. 2d 541, 256 P.2d 637 (1st Dist. 1953).

Ill.—Maley v. Burns, 6 Ill. 2d 11, 126 N.E.2d 695 (1955).

[FN14] Ark.—Blalock v. Blalock, 222 Ark. 299, 258 S.W.2d 891 (1953).

[FN15] Cal.—Fahrney v. Wilson, 180 Cal. App. 2d 694, 4 Cal. Rptr. 670 (3d Dist. 1960).

[FN16] N.Y.—Payne v. Connelly, 32 A.D.2d 693, 299 N.Y.S.2d 1013 (3d Dep't 1969).

Pa.—Gerlock v. Gabel, 380 Pa. 471, 112 A.2d 78 (1955).

[FN17] Vt.—Mahoney v. Leddy, 126 Vt. 98, 223 A.2d 456 (1966).

[FN18] Idaho—Thomas v. Thomas, 83 Idaho 86, 357 P.2d 935 (1960).

Mo.—Masterson v. Plummer, 343 S.W.2d 352 (Mo. Ct. App. 1961).

[FN19] Neb.—Zych v. Zych, 183 Neb. 708, 163 N.W.2d 882 (1969).

[FN20] N.M.—Bassett v. Bassett, 110 N.M. 559, 798 P.2d 160 (1990).

[FN21] Ill.—Johnson v. Bondy, 89 Ill. App. 2d 149, 232 N.E.2d 176 (1st Dist. 1967).

[FN22] Wash.—In re Madsen's Estate, 48 Wash. 2d 675, 296 P.2d 518 (1956).

W.Va.—Hoglund v. Curtis, 134 W. Va. 735, 61 S.E.2d 642 (1950).

[FN23] Ala.—Osborn v. Empire Life Ins. Co. of America, 342 So. 2d 763 (Ala. 1977).

Ga.—Dixon v. Dixon, 211 Ga. 557, 87 S.E.2d 369 (1955).

[FN24] Tex.—Suda v. Vaughan, 285 S.W.2d 837 (Tex. Civ. App. Beaumont 1955).

[FN25] Ark.—Blalock v. Blalock, 222 Ark. 299, 258 S.W.2d 891 (1953).

[FN26] Ind.—Hinds v. McNair, 235 Ind. 34, 129 N.E.2d 553 (1955).

Tex.—Hopper v. Hopper, 270 S.W.2d 256 (Tex. Civ. App. Dallas 1954), dismissed, (Oct. 13, 1954).

[FN27] U.S.—Darden v. Darden, 152 F.2d 208 (C.C.A. 4th Cir. 1945).

Md.—Dougherty v. Dougherty, 175 Md. 441, 2 A.2d 433 (1938).

[FN28] S.D.—Christie v. Dold, 524 N.W.2d 866 (S.D. 1994).

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West's Key Number Digest

West's Key Number Digest, Trusts 40, 40.1, 41

An intention to create an express trust will not be presumed in the absence of an express declaration to that effect where the whole purpose of the deed or other instrument, without peril to the rights of any person, can be accomplished under the power conferred by the instrument.

An intention to create an express trust will not be presumed in the absence of an express declaration to that effect, where the whole purpose of the deed or other instrument, without peril to the rights of any person, can be accomplished under the power conferred by the instrument.[FN1] It may be assumed that a valid trust was created when a person takes out shares of a family corporation in his or her name as trustee for his or her children.[FN2]

A legal presumption obtains in favor of delivery of a trust agreement,[FN3] and the burden of proof rests on the grantor and those claiming under him or her to show an absence of delivery.[FN4]

Where property is claimed under a trust imposed on a third person, the burden is on the beneficiary to show that the legal title passed beyond the control of the settlor in his or her lifetime, to the trustee or beneficiary.[FN5]

Ordinarily, there is a presumption against the creation of a spendthrift trust unless either words to that effect are set forth or a clear and undoubted intention to that end is manifested by terms of the instrument.[FN6]

[FN1] Ill.—Maley v. Burns, 6 Ill. 2d 11, 126 N.E.2d 695 (1955).

[FN2] Cal.—Church v. Church, 40 Cal. App. 2d 696, 105 P.2d 640 (2d Dist. 1940).

[FN3] Cal.—George v. Soares, 54 Cal. App. 2d 29, 128 P.2d 377 (1st Dist. 1942).

Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

N.C.—Cannon v. Blair, 229 N.C. 606, 50 S.E.2d 732 (1948).

Presumption held not created

Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

[FN4] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

[FN5] Cal.—Lawson v. Lowengart, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1st Dist. 1967).

[FN6] Tex.—Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. Texarkana 1952), writ refused n.r.e.

Utah—Cronquist v. Utah State Agr. College, 114 Utah 426, 201 P.2d 280 (1949).

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§ 73. Existence, validity, and terms of trust

West's Key Number Digest

West's Key Number Digest, Trusts 🔑41

There is a strong presumption against the existence of an orally created trust, and one who alleges an express trust has the burden of proving it. Where there is evidence establishing an express trust, favorable presumptions arise, and the burden of proof is on the party disputing its validity or terms.

There is a strong presumption against the existence of an orally created trust,[FN1] and presumptions which are not the usual and almost necessary deductions from the facts proved may not be indulged to engraft a parol trust on a legal title.[FN2] Ordinarily, a person holding the title or possession of property is presumed to be the absolute owner.[FN3] Where a transfer of property is made without consideration, no inference that the transferee is to hold the property for the benefit of the transferor arises,[FN4] and a conveyance for a recited consideration of love and affection is presumptively a gift as distinguished from a trust.[FN5] Furthermore, the omission of covenants of general warranty of title in a deed does not give rise to an inference that the land was to be held in trust for the benefit of the grantor.[FN6] An obligation to give away one's property by means of trust is not to be presumed.[FN7]

One who alleges an express trust has the burden of proving it.[FN8]

When there is evidence establishing an express trust, favorable presumptions arise,[FN9] such as that a person executing a declaration of trust is of sound mind.[FN10] Where there is evidence that, except for occasional intervals, the grantor in a deed of trust was insane during a period of time including the execution of the deed, the burden is on the person asserting the trust to show that it was executed during a lucid interval.[FN11]

[FN1] U.S.—Stone v. Stone, 460 F.2d 64 (4th Cir. 1972).

Ark.—Ripley v. Kelly, 207 Ark. 1011, 183 S.W.2d 793 (1944).

[FN2] Neb.—Halsted v. Halsted, 169 Neb. 325, 99 N.W.2d 384 (1959).

Tex.—Groseclose v. Johnston, 184 S.W.2d 548 (Tex. Civ. App. Austin 1944).

[FN3] C.J.S., Property § 69.

[FN4] Kan.—Fooshee v. Kasenberg, 152 Kan. 100, 102 P.2d 995 (1940).

[FN5] Tex.—Small v. Brooks, 163 S.W.2d 236 (Tex. Civ. App. Austin 1942), writ refused w.o.m., (Sept. 30, 1942).

[FN6] W.Va.—Bobbitt v. Bobbitt, 130 W. Va. 173, 43 S.E.2d 65 (1947).

[FN7] U.S.—Van Sciver v. Rothensies, 122 F.2d 697 (C.C.A. 3d Cir. 1941).

[FN8] Pa.—L. C. S. Colliery, Inc. v. Mack, 447 Pa. 276, 290 A.2d 260 (1972).

Vt.—Tyree v. Ortiz, 127 Vt. 177, 243 A.2d 774 (1968).

[FN9] Cal.—Meyer v. Glenmoor Homes, Inc., 246 Cal. App. 2d 242, 55 Cal. Rptr. 502 (1st Dist. 1966).

Md.—Shirk v. Suburban Trust Co., 248 Md. 114, 235 A.2d 549 (1967).

[FN10] U.S.—Harrison v. City Nat. Bank of Clinton, Iowa, 210 F. Supp. 362 (S.D. Iowa 1962).

Cal.—American Trust Co. v. Dixon, 26 Cal. App. 2d 426, 78 P.2d 449 (1st Dist. 1938).

[FN11] Del.—Taylor v. Howett, 39 Del. Ch. 569, 170 A.2d 917 (1961).

Pa.—In re Meyers, 410 Pa. 455, 189 A.2d 852 (1963).

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§ 74. Deposits in bank

West's Key Number Digest

West's Key Number Digest, Trusts 41

One who alleges an express trust in his or her favor in a bank deposit has the burden of proving it, but the language of a deposit agreement may give rise to a presumption that a trust was created, and if it does, the burden of rebutting the presumption is on the person asserting a lack of intention to create a trust or attacking the transfer as illusory.

In accordance with the general rule,[FN1] one who alleges an express trust in his or her favor in a bank deposit has the burden of proving it.[FN2] Where the owner of a bank account transfers it to a new account opened in the owner's name in trust for himself or herself and another, joint owners, subject to the order of either, a rebuttable presumption of a trust in the account arises.[FN3] On the other hand, the mere language of a deposit document which makes no mention of a trust, but which provides that the account is thereafter to be a joint account in the names of the owner and another, subject to the order of either, and balance at death of either to the survivor does not raise the presumption that a trust was established,[FN4] but the burden is on the survivor to show the existence of such a trust,[FN5] and even if a presumption of a trust arose, it would be rebuttable.[FN6]

If a person deposits his or her own money, in his or her own name, in trust for another, and dies before the beneficiary, without revocation or some decisive act or declaration of disaffirmance, a presumption arises that an absolute trust as to the balance remaining on deposit at the death of the depositor was created.[FN7] The presumption is rebuttable,[FN8] and a controverting demonstration may be made either to show that there was no initial intention to confer the claimed benefit, or that after the opening of the account with the requisite trust intent, the sentiments of the depositor changed.[FN9] Thus, while some courts have held that no presumption of a trust arises from the opening of an account in the depositor's name as trustee

for another,[FN10] others have held that the making of a deposit in a savings account in the depositor's name as trustee for another raises a presumption of an intent to create a tentative trust.[FN11] Moreover, where the language of a deposit agreement shows prima facie the creation of a trust in favor of a third person, the burden of showing want of intention to create a trust is on the person asserting such want of intention[FN12] or attacking the transfer as illusory,[FN13] fraudulent, or unduly influenced.[FN14] When such burden has been met, the burden is then on the alleged beneficiary to establish his or her right to the fund.[FN15]

Where the opening of the account and declaration of trust have been proved, one asserting that the trust has been terminated has the burden of proving it.[FN16]

[FN1] § 73.

[FN2] Vt.—Warner v. Burlington Federal Sav. & Loan Ass'n, 114 Vt. 463, 49 A.2d 93, 168 A.L.R. 1265 (1946).

[FN3] Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

As to creation of trust by deposit in bank, generally, see § 55.

[FN4] U.S.—Murray v. Gadsden, 197 F.2d 194, 33 A.L.R.2d 554 (D.C. Cir. 1952).

[FN5] La.—Northcott v. Livingood, 10 So. 2d 401 (La. Ct. App. 2d Cir. 1942).

[FN6] U.S.—Murray v. Gadsden, 197 F.2d 194, 33 A.L.R.2d 554 (D.C. Cir. 1952).

[FN7] Ind.—First Federal Sav. and Loan Ass'n of Evansville v. Baugh, 160 Ind. App. 102, 310 N.E.2d 101 (1974).

N.Y.—In re Dougherty's Estate, 62 Misc. 2d 348, 309 N.Y.S.2d 1 (Sur. Ct. 1970).

Vt.—In re Estate of Adams, 155 Vt. 517, 587 A.2d 958 (1990).

[FN8] Ind.—First Federal Sav. and Loan Ass'n of Evansville v. Baugh, 160 Ind. App. 102, 310 N.E.2d 101 (1974).

N.Y.—In re Krycun's Estate, 24 N.Y.2d 710, 301 N.Y.S.2d 970, 249 N.E.2d 753 (1969).

[FN9] Cal.—Brucks v. Home Federal Sav. & Loan Ass'n, 36 Cal. 2d 845, 228 P.2d 545 (1951).

N.Y.—In re Campbell's Will, 4 Misc. 2d 643, 147 N.Y.S.2d 377 (Sur. Ct. 1955).

[FN10] Ga.—Spivey v. Methodist Home of South Georgia Conference, 226 Ga. 100, 172 S.E.2d 673 (1970).

Tex.—Baldwin v. Fleck, 168 S.W.2d 904 (Tex. Civ. App. Galveston 1943), judgment aff'd, 141 Tex. 340, 172 S.W.2d 975 (1943).

[FN11] Ill.—In re Petralia's Estate, 48 Ill. App. 2d 122, 198 N.E.2d 200 (1st Dist. 1964), judgment aff'd, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

[FN12] Md.—Bradford v. Eutaw Sav. Bank of Baltimore City, 186 Md. 127, 46 A.2d 284 (1946).

N.Y.—Reff v. Kanterman, 35 Misc. 2d 1029, 231 N.Y.S.2d 720 (Sup 1962), order aff'd, 18 A.D.2d 1104, 239 N.Y.S.2d 971 (2d Dep't 1963).

[FN13] N.Y.—In re Zern's Estate, 138 N.Y.S.2d 894 (Sur. Ct. 1954).

[FN14] N.Y.—In re Timko's Will, 150 Misc. 701, 270 N.Y.S. 323 (Sur. Ct. 1934).

[FN15] N.Y.—Pichurko v. Richardson, 107 N.Y.S.2d 365 (Sup 1951).

[FN16] Cal.—Sherman v. Hibernia Savings & Loan Soc., 129 Cal. App. Supp. 795, 20 P.2d 138 (App. Dep't Super. Ct. 1933).

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§ 75. Relation of parties

West's Key Number Digest

West's Key Number Digest, Trusts 🔑41

The general rule that the burden is on one asserting a trust to establish the trust does not apply where the relation between the parties is of such nature as to show that they did not meet on equal terms, since a trust may be presumed in such case.

The general rule that the burden is on one asserting a trust to establish the trust[FN1] does not apply where the relation between the parties is of such a nature as to show that they did not meet on equal terms.[FN2] The mere fact that confidential relations exist between the grantor on a deed of trust and one of the trustees contingently interested in the subject of the trust after the termination of the trust, on the death of the grantor, does not raise a presumption that undue influence was exercised to procure the execution of the deed.[FN3] So a trust executed by a wife naming her husband as trustee for the benefit of the wife and others is presumptively valid, and the burden of proving invalidity for fraud, duress, or coercion is on the wife.[FN4] The burden of proving that a bank account opened by a parent in trust for himself or herself and his or her child was procured by the child by undue influence is on a third person who asserts it.[FN5]

Once a statutory presumption of undue influence has been established, the trustee bears the burden to present evidence to rebut the presumption.[FN6] Further, the existence of a confidential or fiduciary relation may, under some circumstances, raise a presumption of undue influence, which will cast the burden of showing the want of undue influence on the party seeking to establish a trust.[FN7]

[FN1] § 73.

[FN2] Nev.—Davidson v. Streeter, 68 Nev. 427, 234 P.2d 793 (1951).

[FN3] Mo.—Trotter v. Trotter, 316 S.W.2d 482 (Mo. 1958).

As to fraud in procuring contracts, generally, see C.J.S., Contracts §§ 158 to 174.

[FN4] U.S.—Warner v. Florida Bank & Trust Co., at West Palm Beach, 160 F.2d 766 (C.C.A. 5th Cir. 1947), applying Minnesota law.

[FN5] Md.—Bollack v. Bollack, 169 Md. 407, 182 A. 317 (1936).

[FN6] N.D.—In re Estate of Robinson, 2000 ND 90, 609 N.W.2d 745 (N.D. 2000).

[FN7] Fla.—Tallahassee Bank & Trust Co. v. Brooks, 200 So. 2d 251 (Fla. Dist. Ct. App. 1st Dist. 1967).

Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

Miss.—Jeter v. Culp, 343 So. 2d 1226 (Miss. 1977).

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§ 76. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 🔑45, 46

The validity of a trust is to be determined as of the time it is created and depends not merely on the terms on which it is created but on its effect and the purpose of its creation, and the courts will not declare a lawful trust unreasonable and unjust.

The validity of a trust is determined as of the time it is created[FN1] and depends not merely on the terms on which it is created but on its effect and the purpose of its creation.[FN2] A trust is not invalid because it fails to provide when the trust should terminate,[FN3] because it is based wholly on a contingency which may never arise,[FN4] because it is drafted by a person not authorized to practice law,[FN5] or because it may result in tax evasion.[FN6]

Charitable trusts are favored and will be held valid whenever possible.[FN7]

[FN1] Ill.—In re Joseph's Estate, 30 Ill. App. 2d 492, 175 N.E.2d 265 (1st Dist. 1961).

Md.—Borotka v. Boulay, 268 Md. 244, 299 A.2d 803 (1973).

Trust held valid

Miss.—Jeter v. Culp, 343 So. 2d 1226 (Miss. 1977).

[FN2] Colo.—Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956).

N.Y.—Kreindler v. Irving Trust Co., 26 A.D.2d 746, 272 N.Y.S.2d 202 (3d Dep't 1966), adhered to, 26 A.D.2d 878, 273 N.Y.S.2d 1023 (3d Dep't 1966) and order aff'd,

23 N.Y.2d 785, 297 N.Y.S.2d 148, 244 N.E.2d 714 (1968).

As to cancellation for invalidity, see § 90.

Theory of no "meeting of the minds" held not applicable

Ohio—Lah v. Rogers, 125 Ohio App. 3d 164, 707 N.E.2d 1208 (11th Dist. Lake County 1998).

[FN3] Wyo.—McGinnis v. McGinnis, 391 P.2d 927 (Wyo. 1964).

[FN4] Ill.—Estate of Elliott, 33 Ill. App. 3d 1046, 339 N.E.2d 378 (1st Dist. 1975).

[FN5] Pa.—In re Umble's Estate, 323 Pa. 170, 186 A. 75 (1936).

[FN6] Cal.—Hansen v. Bear Film Co., 28 Cal. 2d 154, 168 P.2d 946 (1946).

[FN7] Fla.—Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990).

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§ 77. Mental capacity

West's Key Number Digest

West's Key Number Digest, Trusts ⚷46

A trust will be invalidated by mental incapacity on the part of the settlor at the time of execution.

A trust will be invalidated by mental incapacity on the part of the settlor at the time of execution.[FN1] Mental incompetency, which will defeat the trust, exists where a person is incapable of understanding and acting with discretion in the ordinary affairs of life[FN2] or is incapable of understanding, in a reasonable manner, the nature and effect of the trust.[FN3] Debilitating illness or bodily infirmities[FN4] and advancing years[FN5] will not of themselves deprive the settlor of requisite mental capacity, nor will the testator necessarily be deemed incompetent by reason of a delusion[FN6] or mere eccentricities or peculiarities of behavior.[FN7] However, a trust which is the consequence of an insane delusion cannot stand, and the fact that the settlor acted voluntarily does not necessarily mean that he or she was capable of making a valid trust.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

With regard to the mental capacity necessary to execute a trust, mental incapacity is not always permanent and a person may have lucid moments or intervals when that person possesses the necessary capacity to convey property. Kibbee v. First Interstate Bank, 2010 WY 143, 242 P.3d 973 (Wyo. 2010).

[END OF SUPPLEMENT]

[FN1] U.S.—Greenwood v. Greenwood, 145 F. Supp. 653 (E.D. Pa. 1956).

Ill.—Brown v. Commercial Nat. Bank of Peoria, 94 Ill. App. 2d 273, 237 N.E.2d 567 (3d Dist. 1968), judgment aff'd, 42 Ill. 2d 365, 247 N.E.2d 894 (1969).

As to mental incapacity of settler as ground for cancellation, see § 90.

Competency standard governing conveyances

A trust agreement is an inter vivos conveyance of property and is therefore subject to the competency standard governing conveyances.

Ala.—Belcher v. Queen, 2009 WL 2997602 (Ala. 2009).

[FN2] U.S.—Harrison v. City Nat. Bank of Clinton, Iowa, 210 F. Supp. 362 (S.D. Iowa 1962).

Evidence

The occurrences and circumstances close to the time of the execution of a trust document, both before and after, which tend to shed light on the issue of testamentary incapacity at the time of the execution of the document at issue, are competent evidence regarding whether the grantor had the required degree of mentality.

Mo.—In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009).

[FN3] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

Utah—Cornia v. Cornia, 546 P.2d 890 (Utah 1976).

Understanding of nature of act

Ill.—Brown v. Commercial Nat. Bank of Peoria, 42 Ill. 2d 365, 247 N.E.2d 894 (1969).

Md.—Owings v. Owings, 233 Md. 357, 196 A.2d 908 (1964).

[FN4] Md.—Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942).

Ohio—Lah v. Rogers, 125 Ohio App. 3d 164, 707 N.E.2d 1208 (11th Dist. Lake County 1998).

[FN5] Md.—Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942).

[FN6] Cal.—American Trust Co. v. Dixon, 26 Cal. App. 2d 426, 78 P.2d 449 (1st Dist. 1938).

[FN7] Md.—Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942).

[FN8] Md.—Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942).

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§ 78. Mistake

West's Key Number Digest

West's Key Number Digest, Trusts 🔑47

Generally speaking, a fundamental and material mistake of fact on the part of the settlor in setting up a trust may invalidate it.

Generally speaking, a fundamental and material mistake of fact on the part of the settlor in setting up a trust may invalidate it[FN1] and furnish ground for setting it aside.[FN2] In some circumstances, a trust executed with the mistaken impression that it is revocable is subject to being declared void on complaint of the settlor. However, a decedent's mistake of fact, as opposed to lack of capacity, does not necessarily provide a basis for nullifying a trust amendment.[FN3] Whether a settlor of a trust was mistaken as to the legal effect of the instrument signed is governed by the facts.[FN4]

[FN1] Cal.—Walton v. Bank of California, Nat. Assoc., 218 Cal. App. 2d 527, 32 Cal. Rptr. 856 (1st Dist. 1963).

[FN2] § 90.

[FN3] N.Y.—Vogt v. Witmeyer, 212 A.D.2d 1013, 622 N.Y.S.2d 393 (4th Dep't 1995), order aff'd, 87 N.Y.2d 998, 642 N.Y.S.2d 619, 665 N.E.2d 189 (1996).

[FN4] N.Y.—Harrison v. Grobe, 790 F. Supp. 443 (S.D. N.Y. 1992), judgment aff'd, 984 F.2d 594 (2d Cir. 1993).

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Topic Summary References Correlation Table

§ 79. Fraud

West's Key Number Digest

West's Key Number Digest, Trusts 🔑48

An instrument purporting to create a trust is void when its execution has been procured by fraud.

An instrument purporting to create a trust is void when its execution has been procured by fraud,[FN1] and it may be set aside.[FN2] This is also the position of the Uniform Trust Code.[FN3] In finding that the execution of an instrument did not create a trust, equity is not bound by the recitals in the instrument but may consider circumstances surrounding its execution and determine that it was procured by fraud.[FN4]

[FN1] D.C.—White v. Sargent, 875 A.2d 658 (D.C. 2005).

[FN2] § 93.

[FN3] Unif. Trust Code § 406.

[FN4] Cal.—Hillman v. Stults, 263 Cal. App. 2d 848, 70 Cal. Rptr. 295 (2d Dist. 1968).

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Topic Summary References Correlation Table

§ 80. Undue influence

West's Key Number Digest

West's Key Number Digest, Trusts 🔑49

Where a declaration of trust is procured by undue influence, it is invalid and unenforceable, but the influence exerted must be undue and operative to such a degree as to amount in effect to coercion.

Where a declaration of trust is procured by undue influence, it is invalid and unenforceable[FN1] and may be set aside.[FN2] This is also the position of the Uniform Trust Code.[FN3]

The influence exerted on the creator of the trust must be undue.[FN4] For undue influence to be sufficient to invalidate a trust, it must amount to deception or force and coercion so that the grantor is deprived of free agency and the will of another is substituted for that of the grantor.[FN5] It is not enough when attempting to establish undue influence and invalidate a trust to show that there was an opportunity to exert influence coupled with a substantial benefit under the trust, as actual deprivation of the grantor's free will is required.[FN6] Undue influence is mental, moral, or physical exertion which destroys the free agency of a settlor by preventing the settlor from following the dictates of his or her own mind and will and accepting instead the domination and influence of another.[FN7] Undue influence on a settlor, as a form of fraud, must be proven by clear and convincing evidence.[FN8]

Evidence of the grantor's weakened mental state may support a finding of undue influence in the creation of a trust, as the influence necessary to dominate a weak mind is less than that necessary to dominate a strong one.[FN9] However, changes in a testamentary trust are not the product of undue influence simply because they are made by a 95-year-old settlor, absent any evidence of how the settlor's physical or mental condition was such as to permit her will to be overborne.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

In the absence of some evidence of actual activity by daughter to subvert her mother's freedom of will in regards to estate plan and trust documents, step-brother could not prevail on his claim of undue influence; daughter was absent not only during the time when the initial decision to modify the estate plan was made, but was also excluded from virtually all discussions between mother and her attorneys concerning her estate planning. Kibbee v. First Interstate Bank, 2010 WY 143, 242 P.3d 973 (Wyo. 2010).

[END OF SUPPLEMENT]

[FN1] U.S.—Clyde v. Hodge, 460 F.2d 532 (3d Cir. 1972).

Ill.—Kelley v. First State Bank of Princeton, 81 Ill. App. 3d 402, 36 Ill. Dec. 566, 401 N.E.2d 247 (3d Dist. 1980).

Kan.—Olson v. Harshman, 233 Kan. 1055, 668 P.2d 147 (1983).

Undue influence shown

Tex.—Cooper v. Cochran, 288 S.W.3d 522 (Tex. App. Dallas 2009), rule 53.7(f) motion granted, (Sept. 17, 2009).

Undue influence not shown

Ind.—Trent v. National City Bank of Indiana, 918 N.E.2d 646 (Ind. Ct. App. 2009), transfer denied, (Apr. 1, 2010).

[FN2] § 90.

[FN3] Unif. Trust Code § 406.

[FN4] Ill.—Brown v. Commercial Nat. Bank of Peoria, 94 Ill. App. 2d 273, 237 N.E.2d 567 (3d Dist. 1968), judgment aff'd, 42 Ill. 2d 365, 247 N.E.2d 894 (1969).

Presumption of continuance of undue influence

Utah—Robertson v. Campbell, 674 P.2d 1226 (Utah 1983).

[FN5] Ga.—Lewis v. Van Anda, 282 Ga. 763, 653 S.E.2d 708 (2007).

[FN6] Ga.—Lewis v. Van Anda, 282 Ga. 763, 653 S.E.2d 708 (2007).

[FN7] N.J.—In re Niles, 176 N.J. 282, 823 A.2d 1 (2003).

[FN8] N.J.—In re Niles, 176 N.J. 282, 823 A.2d 1 (2003).

[FN9] Ga.—Lewis v. Van Anda, 282 Ga. 763, 653 S.E.2d 708 (2007).

[FN10] Wyo.—Mercado v. Trujillo, 980 P.2d 824 (Wyo. 1999).

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§ 81. Undue influence—Confidential relationship

West's Key Number Digest

West's Key Number Digest, Trusts ⚷49

A confidential relationship involved in a trust case may not be misused, unfairly and unreasonably, to the advantage of the dominant party.

The criteria for establishing undue influence are: (1) a confidential relationship between the trustor and the person attempting to influence the trustor; (2) a physical or mental condition in the trustor that affects her ability to withstand the influence; (3) an unnatural disposition of property reflecting a mind which is unbalanced or susceptible to influence; and (4) demands or importunities made by the person seeking to influence the trustor that may affect the trustor, taking into consideration the time, place, and all the surrounding circumstances.[FN1] A confidential relationship exists, for purposes of establishing undue influence in the creation of a trust, where a person is so situated as to exercise a controlling influence over the will, conduct, and interest of the grantor.[FN2]

A confidential relationship involved in a trust case may not be misused, unfairly and unreasonably, to the advantage of the dominant party.[FN3] A transfer of property to the dominant party must be a deliberate and voluntary act of the grantor, and must be fair, proper, and reasonable under the circumstances.[FN4] In accordance with rules as to deeds,[FN5] the mere fact that a confidential relationship exists between the grantor and the grantee does not alone invalidate a trust,[FN6] especially where it appears that the grantor had competent and independent advice of an attorney, or the trust was not procured through improper means attended with circumstances of oppression or overreaching.[FN7] This rule applies even though the relationship of conservator, guardian, or administrator exists between the grantor and the trustee.[FN8] Where, however, the person in whom confidence is reposed exerts his or her influence to procure an advantage at the expense of the grantor, the trust may be deemed invalid[FN9] and may be set aside.[FN10] Whether such close and confidential relationships exist

between the parties as to enable one to dominate and control the other is ordinarily a question of fact dependent on the circumstances of each case.[FN11]

A presumption of undue influence arises when it is shown that the trust was made at the request of a person who receives a substantial benefit, who is not a natural object of the maker's bounty, and who held a confidential relationship with the grantor.[FN12] The existence of a confidential or fiduciary relationship may, under some circumstances, raise a presumption of undue influence, which will cast the burden of showing the want of undue influence on the party seeking to establish the trust.[FN13] Indeed, a family relationship between the beneficiary and the settlor does not shift the burden of proof to a contestant of the trust to show a breach of fiduciary duty.[FN14] Further, where the grantee secures no undue benefit from the grant,[FN15] the mere fact of the relation of attorney and client,[FN16] parent and child,[FN17] or other blood relationship[FN18] does not raise a presumption of undue influence.

[FN1] Mont.—Matter of Estate of Eggebrecht, 1998 MT 249, 291 Mont. 174, 967 P.2d 388 (1998).

[FN2] Ga.—Lewis v. Van Anda, 282 Ga. 763, 653 S.E.2d 708 (2007).

[FN3] Md.—Upman v. Clarke, 127 Md. App. 628, 736 A.2d 380 (1999), judgment aff'd, 359 Md. 32, 753 A.2d 4 (2000).

[FN4] Md.—Upman v. Clarke, 127 Md. App. 628, 736 A.2d 380 (1999), judgment aff'd, 359 Md. 32, 753 A.2d 4 (2000).

[FN5] C.J.S., Deeds § 136.

[FN6] U.S.—Clyde v. Hodge, 460 F.2d 532 (3d Cir. 1972).

Miss.—Jeter v. Culp, 343 So. 2d 1226 (Miss. 1977).

As to agreements of persons in confidential capacity, see C.J.S., Contracts § 193.

[FN7] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

[FN8] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

[FN9] N.Y.—Kazaras v. Manufacturers Trust Co., 156 N.Y.S.2d 275 (Sup 1956), judgment aff'd, 4 A.D.2d 227, 164 N.Y.S.2d 211 (1st Dep't 1957), judgment aff'd, 4 N.Y.2d 930, 175 N.Y.S.2d 172, 151 N.E.2d 356 (1958).

Or.—Egr v. Egr, 170 Or. 1, 131 P.2d 198 (1942).

[FN10] § 90.

[FN11] Ill.—Turley v. Turley, 374 Ill. 571, 30 N.E.2d 64 (1940).

Or.—Egr v. Egr, 170 Or. 1, 131 P.2d 198 (1942).

[FN12] Ga.—Lewis v. Van Anda, 282 Ga. 763, 653 S.E.2d 708 (2007).

[FN13] § 75.

[FN14] Mass.—Cleary v. Cleary, 427 Mass. 286, 692 N.E.2d 955 (1998).

[FN15] Cal.—Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P.2d 718 (4th Dist. 1941).

Mo.—Bakewell v. Clemens, 354 Mo. 686, 190 S.W.2d 912 (1945).

[FN16] Mo.—Bakewell v. Clemens, 354 Mo. 686, 190 S.W.2d 912 (1945).

[FN17] Cal.—Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P.2d 718 (4th Dist. 1941).

[FN18] Miss.—Jeter v. Culp, 343 So. 2d 1226 (Miss. 1977).

Tex.—Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257 (Tex. 1974).

No undue influence by grandson who was attorney

Ohio—Lah v. Rogers, 125 Ohio App. 3d 164, 707 N.E.2d 1208 (11th Dist. Lake County 1998).

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§ 82. Duress

West's Key Number Digest

West's Key Number Digest, Trusts ⚷50

Duress that would invalidate a settlor's execution of an irrevocable trust is shown where one is compelled to perform an act which he or she has a legal right to abstain from performing.

A declaration of trust procured by duress is invalid.[FN1] This is also the position of the Uniform Trust Code.[FN2] Duress that would invalidate a settlor's execution of an irrevocable trust is shown where one is compelled to perform an act which he or she has a legal right to abstain from performing.[FN3] The compulsion must be such as to overcome the exercise of free will and must involve an act or threat of action from which a person sought to be influenced is entitled to be free.[FN4] A threat to do that which one has a right to do does not constitute duress.[FN5]

Children are free to talk to a parent and try to persuade the parent to take action they deem to be in the parent's best interest, and the persuasion can be intense, emotional, and pressured, without having placed the parent under duress that would invalidate a trust the parent was persuaded to establish.[FN6]

[FN1] U.S.—Prudential Ins. Co. of America v. Osadchy, 54 F. Supp. 711 (W.D. Mo. 1944).

N.Y.—Kazaras v. Manufacturers Trust Co., 4 A.D.2d 227, 164 N.Y.S.2d 211 (1st Dep't 1957), judgment aff'd, 4 N.Y.2d 930, 175 N.Y.S.2d 172, 151 N.E.2d 356 (1958).

Duress shown

Tex.—Cooper v. Cochran, 288 S.W.3d 522 (Tex. App. Dallas 2009), rule 53.7(f) motion granted, (Sept. 17, 2009).

[FN2] Unif. Trust Code § 406.

[FN3] U.S.—Harrison v. Grobe, 790 F. Supp. 443 (S.D. N.Y. 1992), judgment aff'd, 984 F.2d 594 (2d Cir. 1993).

[FN4] U.S.—Harrison v. Grobe, 790 F. Supp. 443 (S.D. N.Y. 1992), judgment aff'd, 984 F.2d 594 (2d Cir. 1993).

[FN5] U.S.—Harrison v. Grobe, 790 F. Supp. 443 (S.D. N.Y. 1992), judgment aff'd, 984 F.2d 594 (2d Cir. 1993).

[FN6] U.S.—Harrison v. Grobe, 790 F. Supp. 443 (S.D. N.Y. 1992), judgment aff'd, 984 F.2d 594 (2d Cir. 1993).

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§ 83. Illegality of provisions

West's Key Number Digest

West's Key Number Digest, Trusts ⚷51

The right to create an express trust is subordinate to the fundamental principles of equity, and an express trust created in violation of such principles is a nullity.

The right to create an express trust is subordinate to the fundamental principles of equity, and an express trust created in violation of such principles is a nullity.[FN1] Courts will effectuate the terms of a trust if it is not contrary to public policy.[FN2] Moreover, an express trust cannot be created to effect a purpose which is illegal,[FN3] contrary to public policy,[FN4] or in contravention of the law and the judgments of the courts.[FN5]

Conditions or restrictions.

Conditions or restrictions attached to the enjoyment of a trust estate which are unlawful or opposed to public policy are void.[FN6]

In accordance with the rules governing the validity of agreements affecting marital relations,[FN7] while a condition in a trust instrument is void which is in restraint of marriage, where the scheme of the trust does not tend to restrain marriage, the condition is valid.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Under California law, a trust created for the purpose of defrauding creditors or other persons is illegal and may be disregarded. West's Ann.Cal.Prob.Code § 15203. In re Schwarzkopf, 626 F.3d 1032 (9th Cir. 2010).

[END OF SUPPLEMENT]

[FN1] Ind.—Leazenby v. Clinton County Bank & Trust Co., 171 Ind. App. 243, 355 N.E.2d 861 (1976).

[FN2] Ill.—In re Estate of McInerny, 289 Ill. App. 3d 589, 224 Ill. Dec. 723, 682 N.E.2d 284 (1st Dist. 1997).

[FN3] N.M.—Bauer v. Bates Lumber Co., Inc., 84 N.M. 391, 503 P.2d 1169 (Ct. App. 1972).

[FN4] U.S.—Com. of Pa. v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966).

Ariz.—Myerson v. Myerson, 88 Ariz. 385, 357 P.2d 133 (1960).

Pa.—Borden v. Baldwin, 444 Pa. 577, 281 A.2d 892, 51 A.L.R.3d 1311 (1971).

[FN5] Ga.—National Bank of Georgia v. First Nat. Bank of Atlanta, 234 Ga. 734, 218 S.E.2d 23 (1975).

[FN6] Conn.—Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A. 555 (1926).

[FN7] C.J.S., Contracts § 245.

[FN8] N.Y.—Young v. Kraeling, 134 N.Y.S.2d 109 (Sup 1954).

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§ 84. Partial invalidity

West's Key Number Digest

West's Key Number Digest, Trusts ⚷52

The invalidity of some of the objects or provisions of a trust, or of part of several trusts created by the same instrument, will not affect the validity of remaining objects, provisions, or trusts which are separate and independent, but the rule is otherwise where the valid and invalid parts are so intertwined that one is not enforceable, according to the intent of the creator of the trust, without the other.

The invalidity of some of the objects or provisions of a trust, or of part of several trusts created by the same instrument, will not affect the validity of remaining objects, provisions, or trusts which are separate and independent but in such case the invalid portions will be rejected and the valid portions permitted to stand.[FN1] So a life estate in trust, good in itself, is not destroyed by the invalidity of the remainder over.[FN2] The rule is otherwise where the trust instrument itself so provides,[FN3] or where the valid and invalid parts are so blended and intertwined in one scheme that one is not enforceable, according to the intent of the creator of the trust, without the other.[FN4] Closely allied to the rule of severability is the doctrine of modifying clauses which permits a gift in trust to be valid in spite of the imposition of an invalid qualification thereof, if the gift and the qualification are verbally separable.[FN5] Essentially, it is a rule of construction employed to effectuate, insofar as possible, the intention of the trustor.[FN6]

[FN1] Fla.—In re Estate of Jones, 318 So. 2d 231 (Fla. Dist. Ct. App. 2d Dist. 1975).

La.—Succession of McLean, 580 So. 2d 935 (La. Ct. App. 2d Cir. 1991), writ denied, 584 So. 2d 682 (La. 1991).

Minn.—In re Trust Known as Great Northern Iron Ore Properties, 308 Minn. 221, 243 N.W.2d 302 (1976).

Partial invalidity:

As to voting trusts of stock, see C.J.S., Corporations § 469.

As to trusts generally violating rule against perpetuities or accumulations, see C.J.S., Perpetuities §§ 38, 44 to 49.

[FN2] Del.—Wilmington Trust Co. v. Wilmington Trust Co., 25 Del. Ch. 121, 15 A.2d 153 (1940), aff'd, 26 Del. Ch. 397, 24 A.2d 309, 139 A.L.R. 1117 (1942).

Mo.—Brant v. Brant, 273 S.W.2d 734 (Mo. Ct. App. 1954).

[FN3] N.Y.—Chase Nat. Bank of New York City v. Reinicke, 10 N.Y.S.2d 420 (Sup 1938).

[FN4] R.I.—Armington v. Meyer, 103 R.I. 211, 236 A.2d 450 (1967).

Tex.—Land v. Marshall, 426 S.W.2d 841, 39 A.L.R.3d 1 (Tex. 1968).

[FN5] Cal.—Otto v. Union Nat. Bank of Pasadena, 38 Cal. 2d 233, 238 P.2d 961 (1951).

[FN6] Cal.—Otto v. Union Nat. Bank of Pasadena, 38 Cal. 2d 233, 238 P.2d 961 (1951).

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§ 85. What law governs

West's Key Number Digest

West's Key Number Digest, Trusts 2

While the validity of trusts of real property are determined by the law applicable where the realty is located, in the case of trusts of personal property, no invariable rule as to what law governs can be formulated for all cases, but the intention of the settlor, domicile, the location of the trust property, whether the trust is testamentary or inter vivos, and whether the property is tangible or intangible must be considered.

Questions concerning the validity of a trust must be determined in accordance with the laws of the state whose law is applicable to the trust.[FN1] Since the law of the situs of immovable property controls and governs its acquisition, disposition, and devolution,[FN2] the validity of a trust of real estate must be determined by the law of its situs.[FN3]

In the absence of a controlling statutory provision,[FN4] no invariable rule can be formulated for all cases involving varying facts, at least in the case of inter vivos trusts of intangible personal property.[FN5] In determining the question, numerous elements or factors may be considered,[FN6] such as the intention of the settlor, his or her domicile, the domicile of the trustee, the location of the trust property, the place in which the business of the trust is carried on, whether the trust is testamentary or inter vivos, and whether the property involved is tangible or intangible.[FN7] Some authorities have given dominance to one element or combination of elements and some to another,[FN8] although, generally, where a preponderant number of the elements are grouped in one state, the group prevails over any single element, and especially so where the intention of the settlor is included in the larger group.[FN9] Some authorities apparently regard the intention of the settlor as controlling[FN10] and have declared that issues regarding the trust should be determined according to the law chosen by the settlor,[FN11] or according to his or her intention,[FN12] if there is a real connection between the selected jurisdiction and the transaction,[FN13] unless to do so is contrary to the public

policy of the state in which a determination is sought.[FN14] The intent of the settlor when not directly expressed in the trust instrument is to be gathered from all the facts and circumstances,[FN15] including the settlor's domicile, the domicile of the trustee, the location of the trust matter, and the delivery of it to the trustee under the terms of the trust.[FN16] Although it has been stated that the domicile of the settlor is no longer the absolute and controlling consideration,[FN17] other authorities have held or declared that the domicile of the settlor is generally the controlling factor,[FN18] especially in the case of testamentary trusts.[FN19]

Still other authorities have held that the law of the place where the transaction takes place determines the validity of an inter vivos trust of personal property[FN20] or that the validity of a trust of personal property must be determined by the law of the state where the property is situated and the parties intend that it should be administered.[FN21] A trust offending the public policy of the state in which it is to be administered cannot be established regardless of the settlor's residence.[FN22] On the other hand, where a trust is to be administered in a state other than that of the domicile of the settlor, and is valid where it is to be administered, it will be held valid by the courts of the domiciliary state even though invalid under the domiciliary law.[FN23] With respect to trusts of money deposited in a bank,[FN24] the law of the state in which a tentative trust is created and is to be performed governs, notwithstanding the depositor is domiciled in another state when the trust is created and at the time of his or her death,[FN25] and the beneficiary is domiciled in the same state as the depositor.[FN26]

The law in effect at the time of the creation of the trust governs its validity, and for this purpose a trust is regarded as created when the beneficiary becomes entitled to its benefits.[FN27]

The status of a person who may be a beneficiary of a trust is determined by the laws of that person's domicile.[FN28]

The domicile of the donor controls the question of the validity of an exercise of postponed general powers of appointment granted in a trust.[FN29]

[FN1] U.S.—Gross v. Douglass State Bank, 261 F. Supp. 1002 (D. Kan. 1965).

N.Y.—Ministers and Missionaries Ben. Bd. of Am. Baptist Convention v. McKay, 64 Misc. 2d 231, 315 N.Y.S.2d 549 (Sup 1970).

As to what law governs:

Construction and administration of trusts, generally, see § 223.

Resulting trusts, see § 124.

As to charitable trusts, see C.J.S., Charities § 108.

[FN2] C.J.S., Conflict of Laws § 80.

[FN3] Neb.—First Nat. Bank in Mitchell v. Daggett, 242 Neb. 734, 497 N.W.2d 358 (1993).

Pa.—Everson v. Everson, 264 Pa. Super. 563, 400 A.2d 887 (1979), order modified on other grounds, 494 Pa. 348, 431 A.2d 889 (1981).

[FN4] N.Y.—In re Weinstein's Estate, 176 Misc. 592, 28 N.Y.S.2d 137 (Sur. Ct. 1941).

[FN5] N.Y.—Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937).

[FN6] Del.—Hanson v. Wilmington Trust Co., 35 Del. Ch. 411, 119 A.2d 901 (1955), judgment aff'd, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[FN7] N.Y.—In re Griswold's Trust, 99 N.Y.S.2d 420 (Sup 1950).

[FN8] Ky.—Kitchen v. New York Trust Co., 292 Ky. 706, 168 S.W.2d 5 (1943).

[FN9] N.Y.—In re Griswold's Trust, 99 N.Y.S.2d 420 (Sup 1950).

[FN10] Del.—Lewis v. Hanson, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[FN11] N.H.—Flaherty v. Flaherty, 138 N.H. 337, 638 A.2d 1254 (1994).

N.Y.—In re Chappell, 25 Misc. 3d 704, 883 N.Y.S.2d 857 (Sur. Ct. 2009).

[FN12] Del.—Lewis v. Hanson, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[FN13] N.Y.—In re Griswold's Trust, 99 N.Y.S.2d 420 (Sup 1950).

[FN14] N.Y.—Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937).

[FN15] N.Y.—In re Griswold's Trust, 99 N.Y.S.2d 420 (Sup 1950).

[FN16] Del.—Lewis v. Hanson, 36 Del. Ch. 235, 128 A.2d 819 (1957), judgment aff'd, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[FN17] N.Y.—In re Griswold's Trust, 99 N.Y.S.2d 420 (Sup 1950).

[FN18] U.S.—Pitt v. U.S., 209 F. Supp. 624 (W.D. Mo. 1962), judgment aff'd, 319 F.2d 564 (8th Cir. 1963).

Conn.—Stetson v. Morgan Guaranty Trust Co. of N. Y., 22 Conn. Supp. 158, 164 A.2d 239 (Super. Ct. 1960).

[FN19] U.S.—Rousseau v. U.S. Trust Co. of New York, 422 F. Supp. 447 (S.D. N.Y. 1976).

[FN20] N.J.—Howard Sav. Inst. v. Baronych, 8 N.J. Super. 599, 73 A.2d 853 (Ch. Div. 1950).

[FN21] U.S.—Haberland v. Haberland, 303 F.2d 345, 22 Ohio Op. 2d 73, 91 Ohio L. Abs. 412 (3d Cir. 1962).

N.J.—In re Damato's Estate, 86 N.J. Super. 107, 206 A.2d 171 (App. Div. 1965).

[FN22] N.Y.—City Bank Farmers Trust Co. v. Cheek, 202 Misc. 303, 110 N.Y.S.2d 434 (Sup 1952).

[FN23] Md.—Smith v. Mercantile Trust Co. of Baltimore, 199 Md. 264, 86 A.2d 504 (1952).

N.Y.—In re Grant's Will, 200 Misc. 35, 101 N.Y.S.2d 423 (Sur. Ct. 1950).

[FN24] §§ 55 to 57.

[FN25] U.S.—U. S. v. Williams, 160 F. Supp. 761 (D.N.J. 1958).

Substantive law, not conflict of laws rule, applicable

N.J.—In re Damato's Estate, 86 N.J. Super. 107, 206 A.2d 171 (App. Div. 1965).

[FN26] N.J.—Cutts v. Najdrowski, 123 N.J. Eq. 481, 198 A. 885 (Ct. Err. & App. 1938).

[FN27] N.Y.—In re Hyatt's Will, 81 N.Y.S.2d 911 (Sur. Ct. 1948).

[FN28] Minn.—In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, 674 N.W.2d 222 (Minn. Ct. App. 2004).

[FN29] N.Y.—In re Chappell, 25 Misc. 3d 704, 883 N.Y.S.2d 857 (Sur. Ct. 2009).

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§ 86. Right to contest validity

West's Key Number Digest

West's Key Number Digest, Trusts 55

In general, the validity of a trust may be questioned only by a person who will be entitled to some interest in the property in case the trust is declared invalid, and then only when the person is not estopped, or barred by the terms of the trust instrument, but the court may sua sponte, as a matter of public policy, be required to determine the validity of the trust.

In general, the validity of a trust may be questioned only by one who will be entitled to some interest in the property in case the trust is declared invalid,[FN1] and then only when he or she is not estopped[FN2] or barred by the terms of the trust instrument.[FN3] A distributee who has standing to file objections to the probate of a will likewise has standing to contest a revocable trust agreement after its settlor has died.[FN4] The settlor's personal representative may also commence a proceeding to challenge the revocable trust where the settlor was induced to enter into the agreement by fraud or undue influence.[FN5] Strangers to the trust, however, have no right to attack it,[FN6] unless their position as judgment creditors gives them such right.[FN7]

In accordance with general rules,[FN8] the right to invoke the statute of frauds is a personal privilege not available to strangers to the trust.[FN9]

[FN1] Ky.—Eitel v. John N. Norton Memorial Infirmary, 441 S.W.2d 438 (Ky. 1969).

Pa.—In re Renner's Estate, 358 Pa. 409, 57 A.2d 836 (1948).

As to persons entitled to cancellation, see § 90.

[FN2] Ill.—Ross v. Ross, 406 Ill. 598, 94 N.E.2d 885 (1950).

Mere lapse of time did not bar party from asserting invalidity of trust

N.J.—Clark v. Judge, 84 N.J. Super. 35, 200 A.2d 801 (Ch. Div. 1964), judgment aff'd, 44 N.J. 550, 210 A.2d 415 (1965).

[FN3] W.Va.—Sands v. Security Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958).

[FN4] N.Y.—Matter of Estate of Davidson, 177 Misc. 2d 928, 677 N.Y.S.2d 729 (Sur. Ct. 1998).

[FN5] N.Y.—Matter of Estate of Davidson, 177 Misc. 2d 928, 677 N.Y.S.2d 729 (Sur. Ct. 1998).

[FN6] Tex.—Neilon v. Texas Trust & Sec. Co., 147 S.W.2d 321 (Tex. Civ. App. Austin 1940), writ dismissed, judgment correct.

[FN7] Iowa—Tri-State Refining and Inv. Co., Inc. v. Opdahl, 481 N.W.2d 710 (Iowa Ct. App. 1991).

[FN8] C.J.S., Frauds, Statute of § 172.

[FN9] U.S.—Mustard v. U.S., 140 Ct. Cl. 205, 155 F. Supp. 325 (1957).

As to pleading statute in suit to enforce trust, see §§ 768, 807.

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§ 87. Ratification of defective or invalid trust

West's Key Number Digest

West's Key Number Digest, Trusts 🔑54
An invalid trust may, in some cases, be validated by ratification.

An invalid trust may, in some cases, be validated by ratification.[FN1] The acquiescence and ratification of a trust are based on the party's knowledge of prior action and manifest an intent to abide by the action.[FN2] When a trust is invalid when its creation is attempted, but subsequently, the impediment to its validity is removed, a good and valid trust may be created by a subsequent ratification of the terms of the invalid trust.[FN3] A trust agreement induced by undue influence can be ratified by the settlor on his or her restoration to freedom of action.[FN4] However, there can be no effective ratification of a trust agreement procured by false representations while the person who is ratifying is acting under the influence of misrepresentation, concealment, or other wrongful conduct of the trustee.[FN5]

[FN1] N.Y.—Lincoln Rochester Trust Co. v. Smith, 4 Misc. 2d 304, 158 N.Y.S.2d 367 (Sup 1956).

Tex.—Kurtz v. Robinson, 279 S.W.2d 949 (Tex. Civ. App. Amarillo 1955), writ refused n.r.e., (July 20, 1955).

[FN2] Mich.—In re Beglinger Trust, 221 Mich. App. 273, 561 N.W.2d 130 (1997).

[FN3] U.S.—Boyd v. U.S., 34 F.2d 488 (D. Conn. 1929).

[FN4] Mich.—Detroit Bank and Trust Co. v. Grout, 95 Mich. App. 253, 289 N.W.2d 898 (1980).

Utah—Robertson v. Campbell, 674 P.2d 1226 (Utah 1983).

[FN5] U.S.—Tidwell v. Richman, 127 F. Supp. 526 (S.D. Cal. 1953), judgment modified on other grounds, 234 F.2d 361 (9th Cir. 1956).

Mich.—In re Beglinger Trust, 221 Mich. App. 273, 561 N.W.2d 130 (1997).

N.Y.—Lipin v. Salkin, 10 Misc. 2d 246, 171 N.Y.S.2d 582 (Sup 1958), order rev'd on other grounds, 6 A.D.2d 785, 175 N.Y.S.2d 119 (1st Dep't 1958).

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§ 88. Estoppel or waiver as to defects or objections

West's Key Number Digest

West's Key Number Digest, Trusts 🔑53

While the parties may not by consent validate a trust which is by law invalid, a person may on general principles of estoppel be precluded from asserting the invalidity of a trust.

While the parties may not by consent validate a trust which is by law invalid,[FN1] a person may on general principles of estoppel be precluded from asserting the invalidity of a trust.[FN2] So the creator of a trust and those claiming through him or her may, under some circumstances, be estopped to question the validity of the trust.[FN3] It is generally indispensable to the application of equitable estoppel that the person claimed to be estopped have full knowledge of the facts at the time when the conduct relied on as the basis of the estoppel took place.[FN4] The doctrine of estoppel cannot operate to make valid a trust instrument void from its very inception.[FN5]

Except where a trustee has been deceived,[FN6] by accepting the trust and undertaking to perform part or all of the duties devolving on him or her, the trustee is estopped to deny the validity of the trust.[FN7] Since the statute of frauds does not prevent a trustee from carrying out a parol trust, but merely makes it voidable at his or her option,[FN8] when the trustee has by conduct ratified and affirmed the trust and induced others to change their position because of it, the doctrine of equitable estoppel comes into play and the trustee cannot deny the validity of the trust on the ground that it violates the statute of frauds.[FN9] In other words, where a person holds property as a trustee, he or she is estopped to deny the existence of the trust.[FN10] However, the estoppel should be limited to saving harmless, or making whole, the person in whose favor it arises, and should not be an instrument of gain or profit.[FN11]

Under general rules, beneficiaries are prohibited from claiming under the trust and at the same time asserting that it is invalid.[FN12] However, it has also been held that the accept-

ance of payment under one section of a testamentary trust does not prevent a contest of the validity of another, separable section of the trust.[FN13]

[FN1] N.Y.—In re Carvalho's Will, 57 N.Y.S.2d 311 (Sur. Ct. 1944), decree aff'd by, 269 A.D. 904, 57 N.Y.S.2d 336 (2d Dep't 1945).

[FN2] Wash.—Bauer v. Bauer, 5 Wash. App. 781, 490 P.2d 1350 (Div. 1 1971).

[FN3] U.S.—Liberty Nat. Bank v. Hicks, 173 F.2d 631, 9 A.L.R.2d 1355 (D.C. Cir. 1948).

Md.—Dove v. White, 211 Md. 228, 126 A.2d 835 (1956).

[FN4] Tex.—La Rue v. Wiggins, 277 S.W.2d 808 (Tex. Civ. App. Waco 1955), writ refused n.r.e., (June 29, 1955).

[FN5] Mo.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 357 Mo. 770, 211 S.W.2d 2 (1948).

[FN6] N.Y.—Lincoln Rochester Trust Co. v. Smith, 4 Misc. 2d 304, 158 N.Y.S.2d 367 (Sup 1956).

[FN7] Cal.—Quan Shew Yung v. Woods, 218 Cal. App. 2d 506, 32 Cal. Rptr. 453 (4th Dist. 1963).

N.Y.—Lincoln Rochester Trust Co. v. Smith, 4 Misc. 2d 304, 158 N.Y.S.2d 367 (Sup 1956).

As to estoppel to deny creator's title, see § 258.

Trustee preparing trust instrument

Fla.—Lamb v. Jones, 202 So. 2d 810 (Fla. Dist. Ct. App. 3d Dist. 1967).

[FN8] § 86.

[FN9] Cal.—Haskell v. First Nat. Bank, 33 Cal. App. 2d 399, 91 P.2d 934 (1st Dist. 1939).

[FN10] S.D.—Kelly v. Gram, 73 S.D. 11, 38 N.W.2d 460 (1949).

[FN11] Ala.—McCarty v. Gant, 248 Ala. 668, 29 So. 2d 136 (1947).

[FN12] Iowa—Meents v. Comstock, 230 Iowa 63, 296 N.W. 721 (1941).

[FN13] Minn.—Arneson v. Arneson, 372 N.W.2d 20 (Minn. Ct. App. 1985).

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§ 89. Effect of invalidity

West's Key Number Digest

West's Key Number Digest, Trusts 🔑61.5

Where a conveyance in trust is invalid or ineffectual for any reason, legal title will be deemed to have remained in the settlor, and if a trust agreement is obtained by fraud, no one can obtain a vested or contingent interest in the property.

When a trust fails, the title of any property purportedly transferred to the trust is deemed held for the transferor or settlor,[FN1] or the settlor's estate,[FN2] especially where it appears that settlor did not intend that the beneficiaries should have title immediately.[FN3] Where a trust is adjudged void, the trustee's payments of income to the beneficiary are not recoverable by the settlor where such payments are acquiesced in by him or her.[FN4] If the trust is invalid, it cannot create a valid power in trust.[FN5] The failure of an oral trust in land by virtue of the effect of the statute of frauds may result in the imposition of a constructive trust under some circumstances or may result in a duty to reconvey title to the settlor.[FN6]

When a trust instrument does not provide for the method of distribution upon termination, the trustee has a duty to make delivery to such a party as is equitably entitled thereto and to deliver such instruments of transfer as the carrier of the property reasonably requires.[FN7]

[FN1] U.S.—In re Moss, 258 B.R. 405 (Bankr. W.D. Mo. 2001).

Cal.—Osswald v. Anderson, 49 Cal. App. 4th 812, 57 Cal. Rptr. 2d 23 (4th Dist. 1996), as modified on denial of reh'g, (Aug. 28, 1996).

Wyo.—Fuller v. Fuller, 606 P.2d 306 (Wyo. 1980).

As to failure or defect in creation of express trust, or execution and termination thereof as giving rise to resulting trust, see § 132.

No trust, no contract

Wash.—Grandy v. Luther, 12 Wash. App. 542, 530 P.2d 679 (Div. 1 1975).

[FN2] S.C.—Seifert v. Southern Nat. Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 (1991).

[FN3] Cal.—Booge v. Reinicke, 45 Cal. App. 2d 260, 114 P.2d 427 (3d Dist. 1941).

[FN4] N.Y.—Ross v. Ross, 137 Misc. 795, 243 N.Y.S. 418 (Sup 1930), aff'd, 233 A.D. 516, 253 N.Y.S. 889 (1st Dep't 1931), aff'd, 262 N.Y. 381, 187 N.E. 65, 89 A.L.R. 1007 (1933) and rev'd on other grounds, 233 A.D. 626, 253 N.Y.S. 871 (1st Dep't 1931), aff'd, 262 N.Y. 381, 187 N.E. 65, 89 A.L.R. 1007 (1933).

[FN5] N.Y.—In re Sutta's Estate, 54 N.Y.S.2d 572 (Sur. Ct. 1941), decree aff'd by, 265 A.D. 994, 39 N.Y.S.2d 993 (1st Dep't 1943).

[FN6] N.M.—Aragon v. Rio Costilla Co-op. Livestock Ass'n, 112 N.M. 152, 812 P.2d 1300 (1991).

[FN7] Mo.—Holdener v. Fieser, 971 S.W.2d 946 (Mo. Ct. App. E.D. 1998).

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§ 90. Cancellation

West's Key Number Digest

West's Key Number Digest, Trusts 🔑56

A trust may be canceled, or set aside, where an equitable ground is shown, but not otherwise.

In order to obtain relief by way of the cancellation or setting aside of a trust, the complainant must bring his or her case within a recognized area of equity jurisdiction.[FN1] So, in the absence of fraud, mistake, duress, undue influence, or other matters cognizable in equity, a trust will not be set aside where it has been voluntarily executed.[FN2] It is no ground for setting aside a trust entered into voluntarily that the settlor dislikes it and is sorry he or she executed it.[FN3]

On the other hand, a trust instrument can be set aside on any ground on which a conveyance not in trust can be set aside.[FN4] So equity will cancel or set aside a trust where its execution is due to fraud,[FN5] mistake or misapprehension,[FN6] or for the other and oft-litigated grounds of undue influence,[FN7] duress,[FN8] or breach of duty in a confidential relationship,[FN9] or where it is not the pure, voluntary, well-understood act of the grantor's mind.[FN10]

The court will not set aside a trust on the ground of mistake where the settlor has, subsequent to its creation, ratified the trust by his or her conduct.[FN11]

Improvidence in the creation of a trust and want of independent advice are not alone sufficient to set aside a donative trust.[FN12] Where the trust entered into voluntarily is for the benefit of the settlor and his or her children without any benefit accruing to the trustee, failure to obtain independent legal advice is no ground for cancellation.[FN13] On the other hand, an inter vivos trust executed by an aged and inexperienced woman has been set aside on the

ground that she did not have adequate independent advice.[FN14]

Where an alleged trust is oral, no formal conveyance by the beneficiary is necessary to cancel or set aside the trust.[FN15]

[FN1] Mich.—Clark v. McCue, 242 Mich. 551, 219 N.W. 653 (1928).

[FN2] Kan.—Peterson v. Peterson, 10 Kan. App. 2d 437, 700 P.2d 585 (1985).

N.Y.—Kreindler v. Irving Trust Co., 26 A.D.2d 746, 272 N.Y.S.2d 202 (3d Dep't 1966), adhered to, 26 A.D.2d 878, 273 N.Y.S.2d 1023 (3d Dep't 1966) and order aff'd, 23 N.Y.2d 785, 297 N.Y.S.2d 148, 244 N.E.2d 714 (1968).

[FN3] Kan.—Peterson v. Peterson, 10 Kan. App. 2d 437, 700 P.2d 585 (1985).

[FN4] Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 90 A.2d 194 (1952), opinion modified on other grounds, 200 Md. 491, 91 A.2d 393 (1952).

[FN5] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 90 A.2d 194 (1952), opinion modified on other grounds, 200 Md. 491, 91 A.2d 393 (1952).

[FN6] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Pa.—In re Scholler's Estate, 403 Pa. 97, 169 A.2d 554 (1961).

Mistake of law

N.Y.—In re Stalp's Will, 79 Misc. 2d 412, 359 N.Y.S.2d 749 (Sur. Ct. 1974).

[FN7] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Ky.—Hines v. Louisville Trust Co., 254 S.W.2d 73 (Ky. 1952).

[FN8] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 90 A.2d 194 (1952), opinion modified on other grounds, 200 Md. 491, 91 A.2d 393 (1952).

[FN9] Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 90 A.2d 194 (1952), opinion modified on other grounds, 200 Md. 491, 91 A.2d 393 (1952).

[FN10] Kan.—Peterson v. Peterson, 10 Kan. App. 2d 437, 700 P.2d 585 (1985).

[FN11] U.S.—Soden v. First Nat. Bank of Kansas City, 77 F. Supp. 98 (W.D. Mo. 1948).

[FN12] N.J.—Fidelity Union Trust Co. v. Parfner, 135 N.J. Eq. 133, 37 A.2d 675 (Ch. 1944).

[FN13] Kan.—Peterson v. Peterson, 10 Kan. App. 2d 437, 700 P.2d 585 (1985).

[FN14] N.J.—Oswald v. Seidler, 136 N.J. Eq. 443, 42 A.2d 216 (Ct. Err. & App. 1945).

N.Y.—Kazaras v. Manufacturers Trust Co., 4 A.D.2d 227, 164 N.Y.S.2d 211 (1st Dep't 1957), judgment aff'd, 4 N.Y.2d 930, 175 N.Y.S.2d 172, 151 N.E.2d 356 (1958).

[FN15] Tex.—Ditto v. Piper, 244 S.W.2d 547 (Tex. Civ. App. Fort Worth 1951), writ refused n.r.e.

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§ 91. Cancellation—Proceedings and relief

West's Key Number Digest

West's Key Number Digest, Trusts ⚷56

Proceedings for the cancellation or setting aside of a trust instrument and the relief awarded are in accordance with the general rules governing proceedings for the cancellation of instruments.

In a suit to set aside a trust, the complainant must state in the petition sufficient grounds entitling him or her to relief.[FN1]

All living persons beneficially interested should be made parties in a suit to set aside an instrument of trust.[FN2] Where it appears at the trial that a complete determination of the controversy may not be had without the presence of other parties, the court may have full power, under statute, to direct them to be brought in.[FN3] Trustees claimed to be liable both individually and as trustees should be sued in both capacities, and it is not enough that they are sued individually.[FN4]

A complainant may be barred of the right to the cancellation of a trust because of laches.[FN5] Where a trust for the lives of the settlors is good, a suit to determine the validity of limitations following the life interests of the settlers' living children is premature and should be dismissed.[FN6]

The burden of proof is on the party alleging one or all of the grounds of cancellation to prove them or some of them.[FN7] When a prima facie case for cancellation is made, the burden is then on the party procuring the execution of the trust to show that the execution was voluntary.[FN8] Where a fiduciary or confidential relationship exists between the grantor and grantee, the burden is on the grantee to prove that the trust was the free, voluntary act of the grantor.[FN9]

In a suit to set aside a trust instrument, the evidence must be sufficient,[FN10] for example, to show that the settlor lacked mental capacity;[FN11] that the trust was procured by fraud, misrepresentation, duress, or undue influence[FN12] or resulted from a breach of fiduciary or confidential relationship;[FN13] or that the settlor misunderstood the provisions of the trust.[FN14] The confidential relationship existing between parent and child requires the trial judge to weigh the evidence with the utmost scrutiny in order to determine, in accordance with equity and fair dealing, whether a parent was unduly influenced by a child in executing trust instruments.[FN15]

In a suit to set aside a trust in equity, the disposal of costs is within the sound discretion of the court[FN16] which will not be reviewed in the absence of abuse.[FN17]

[FN1] Ky.—Burton v. Burton's Trustee, 198 Ky. 429, 248 S.W. 1031 (1923).

[FN2] U.S.—Greenwood v. Greenwood, 16 F.R.D. 366 (E.D. Pa. 1954).

Cal.—Mabry v. Scott, 51 Cal. App. 2d 245, 124 P.2d 659 (2d Dist. 1942).

[FN3] N.Y.—Warren v. Putnam, 263 A.D. 474, 33 N.Y.S.2d 635 (3d Dep't 1942).

[FN4] N.Y.—O'Leary v. Grant, 155 Misc. 98, 278 N.Y.S. 839 (Sup 1935).

[FN5] U.S.—Soden v. First Nat. Bank of Kansas City, 77 F. Supp. 98 (W.D. Mo. 1948).

Ill.—Montgomery v. First Nat. Bank, 293 Ill. App. 631, 13 N.E.2d 116 (1st Dist. 1938).

[FN6] Pa.—In re Miller, 351 Pa. 144, 40 A.2d 484 (1945).

[FN7] Ark.—Union Nat. Bank of Little Rock v. Smith, 240 Ark. 354, 400 S.W.2d 652 (1966).

Mass.—New England Merchants Nat. Bank of Boston v. Mahoney, 356 Mass. 654, 255 N.E.2d 592 (1970).

[FN8] Okla.—Hogan v. Leeper, 1913 OK 428, 37 Okla. 655, 133 P. 190 (1913).

Execution during lucid interval

Ill—Turley v. Turley, 374 Ill. 571, 30 N.E.2d 64 (1940).

[FN9] Md.—McGill v. Nichols, 157 Md. 287, 145 A. 773 (1929).

Burden not shifted

Mo.—Sebree v. Rosen, 349 S.W.2d 865 (Mo. 1961).

[FN10] Ky.—Luttrell v. Turner, 307 Ky. 197, 209 S.W.2d 856 (1948).

[FN11] Md.—Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942).

Mo.—Soden v. First Nat. Bank of Kansas City, 77 F. Supp. 98 (W.D. Mo. 1948).

N.J.—Oswald v. Seidler, 136 N.J. Eq. 443, 42 A.2d 216 (Ct. Err. & App. 1945).

[FN12]

Evidence held sufficient to warrant setting aside trust instrument.

U.S.—Greenwood v. Greenwood, 16 F.R.D. 366 (E.D. Pa. 1954).

N.Y.—Brundige v. Bradley, 51 N.Y.S.2d 830 (Sup 1943), judgment aff'd, 268 A.D. 952, 51 N.Y.S.2d 636 (4th Dep't 1944), judgment rev'd on other grounds, 294 N.Y. 345, 62 N.E.2d 385 (1945).

Evidence held insufficient

Ill.—Boryca v. Parry, 24 Ill. 2d 320, 181 N.E.2d 124 (1962).

Mass.—New England Merchants Nat. Bank of Boston v. Mahoney, 356 Mass. 654, 255 N.E.2d 592 (1970).

N.Y.—Kreindler v. Irving Trust Co., 26 A.D.2d 746, 272 N.Y.S.2d 202 (3d Dep't 1966), adhered to, 26 A.D.2d 878, 273 N.Y.S.2d 1023 (3d Dep't 1966) and order aff'd, 23 N.Y.2d 785, 297 N.Y.S.2d 148, 244 N.E.2d 714 (1968).

[FN13]

Evidence sufficient

Pa.—Kauffman v. Hiestand, 131 Pa. Super. 219, 200 A. 251 (1938).

Evidence held insufficient

Ill.—Kolze v. Fordtran, 412 Ill. 461, 107 N.E.2d 686 (1952).

Iowa—Wagner v. Wagner, 242 Iowa 480, 45 N.W.2d 508 (1951).

[FN14] N.Y.—Guest v. Bessemer Trust Co., 286 A.D. 870, 142 N.Y.S.2d 188 (2d Dep't 1955), order aff'd, 309 N.Y. 875, 131 N.E.2d 288 (1955).

Evidence held insufficient

N.Y.—Kreindler v. Irving Trust Co., 26 A.D.2d 746, 272 N.Y.S.2d 202 (3d Dep't 1966), adhered to, 26 A.D.2d 878, 273 N.Y.S.2d 1023 (3d Dep't 1966) and order aff'd, 23 N.Y.2d 785, 297 N.Y.S.2d 148, 244 N.E.2d 714 (1968).

[FN15] Cal.—Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P.2d 718 (4th Dist. 1941).

[FN16] Ill.—Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

[FN17] C.J.S., Appeal and Error § 910.

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§ 92. Reformation

West's Key Number Digest

West's Key Number Digest, Trusts 🔑57

Trust reformation is an equitable remedy.

Trust reformation is an equitable remedy[FN1] and is an ordinary remedy for mistake in the terms of a trust instrument.[FN2] So, generally, a court of equity will correct and reform a deed of trust or other trust instrument so as to conform to the intention of the parties.[FN3] If, due to a mistake, a trust does not contain the terms that were intended by the settlor, the settlor or other interested party may maintain a suit in equity to have the instrument reformed so that it will contain the terms that were actually agreed upon or that reflect the settlor's actual intent.[FN4] Equity will not, however, perfect a declaration of trust left imperfect by the settlor.[FN5] Even if a will or other instrument creating a donative testamentary or inter vivos trust is unambiguous, the terms of the trust may be reformed by the court to conform the text to the intention of the settlor if the following are established: (1) that a mistake of fact or law, whether in expression or inducement, affected the specific terms of the document, and (2) what the settlor's intention was.[FN6] Equity may intervene to correct a mistake in a trust, whether it is an inter vivos trust or a testamentary trust, and may reform an inter vivos trust even after the settlor is dead.[FN7]

A mistake by the scrivener is one valid ground for reformation of a trust, and the mistake must be proven by clear and decisive evidence.[FN8] Actions to reform trusts by correcting alleged scrivener's errors should not be brought lightly.[FN9] An unexpected increase in the value of trust assets does not justify the reformation of trust instruments.[FN10]

A trust may be reformed in accordance with settlor's intent to minimize taxes[FN11] under the doctrine of mistake.[FN12]

The party seeking reformation of a trust bears the burden of establishing that the settlor's actual intent has been displaced by an error.[FN13] The settlor's intent must be proved by clear and convincing evidence,[FN14] or clear and decisive proof,[FN15] but a statement of intent by the settlor is not necessarily required to grant a reformation of the trust.[FN16] Even though a unilateral mistake by the settlor is a sufficient ground for reforming a trust that was created without any consideration, the burden is nonetheless on the party seeking reformation to establish by clear and convincing evidence the mistake.[FN17]

The reformation of trust instruments may be barred by laches,[FN18] but mere delay which prejudices no one does not constitute ground for refusal of reformation.[FN19]

A trustee holding merely the legal title without any beneficial interest may generally not sue for reformation of the trust.[FN20] Moreover, beneficiaries whose interest will not be affected by the reformation need not be made parties to the proceeding.[FN21]

A settlor may have a trust instrument reformed so as to include a power of revocation, which the settlor intended to include but which was omitted by mistake.[FN22] However, if by mistake the settlor omits to insert in the trust instrument a provision reserving a power of revocation, the court may, without a preliminary decree of reformation, give effect to the transaction as if it had been reformed, by decreeing that the trustee retransfer the trust property to the settlor.[FN23]

The doctrine of reformation for mistake with regard to trusts differs from instruments such as contracts in one important respect; in contract law, reformation will not be granted unless the parties' mistake is mutual, but mutuality of mistake is not always required where trusts are concerned, in that, because a settlor usually receives no consideration for the creation of a trust, a unilateral mistake on the part of the settlor is ordinarily sufficient to warrant reformation.[FN24]

[FN1] Okla.—Shoemaker v. Estate of Freeman, 1998 OK 17, 967 P.2d 871 (Okla. 1998).

[FN2] Mass.—Berman v. Sandler, 379 Mass. 506, 399 N.E.2d 17 (1980).

N.Y.—In re Stalp's Will, 79 Misc. 2d 412, 359 N.Y.S.2d 749 (Sur. Ct. 1974).

Reformation unwarranted

Mass.—Fierst v. Laird, 453 Mass. 1016, 904 N.E.2d 771 (2009).

[FN3] U.S.—Johnson v. Botica, 537 F.2d 930 (7th Cir. 1976).

Mass.—Fleet Bank, N.A. v. Fleet Bank, N.A., 429 Mass. 1003, 706 N.E.2d 627 (1999).

Pa.—In re C. D. Harader Trust for Ben. of Harader, 303 Pa. Super. 10, 449 A.2d 52

(1982).

Settlor's intent

Mass.—Grassian v. Grassian, 445 Mass. 1012, 835 N.E.2d 607 (2005).

[FN4] Cal.—Giammarrusco v. Simon, 171 Cal. App. 4th 1586, 91 Cal. Rptr. 3d 50 (2d Dist. 2009).

[FN5] Wash.—Grandy v. Luther, 12 Wash. App. 542, 530 P.2d 679 (Div. 1 1975).

[FN6] Ind.—Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E.2d 1191 (Ind. 2008).

[FN7] Cal.—Giammarrusco v. Simon, 171 Cal. App. 4th 1586, 91 Cal. Rptr. 3d 50 (2d Dist. 2009).

[FN8] Ind.—Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E.2d 1191 (Ind. 2008).

Mass.—Fierst v. Laird, 453 Mass. 1016, 904 N.E.2d 771 (2009).

Mistake in expression

A drafting error made by the settlor or the scrivener of a trust is referred to as a "mistake in expression."

Cal.—Giammarrusco v. Simon, 171 Cal. App. 4th 1586, 91 Cal. Rptr. 3d 50 (2d Dist. 2009).

[FN9] Mass.—Fierst v. Laird, 453 Mass. 1016, 904 N.E.2d 771 (2009).

[FN10] Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 91 A.2d 393 (1952).

[FN11] Mass.—Grassian v. Grassian, 445 Mass. 1012, 835 N.E.2d 607 (2005).

Settlor's intent to minimize federal estate taxes

Mass.—Freedman v. Freedman, 445 Mass. 1009, 834 N.E.2d 251 (2005).

Reformation for federal generation skipping tax purposes

Mass.—Fiduciary Trust Co. v. Gow, 443 Mass. 1017, 824 N.E.2d 807 (2005).

Reformation of trust to qualify for federal estate tax marital deduction

Mass.—Sheinkopf v. Bornstein, 443 Mass. 1012, 823 N.E.2d 372 (2005).

[FN12] Mass.—Inderieden v. Downs, 445 Mass. 1011, 834 N.E.2d 254 (2005).

[FN13] D.C.—In re Estate of Tuthill, 754 A.2d 272 (D.C. 2000).

[FN14] D.C.—In re Estate of Tuthill, 754 A.2d 272 (D.C. 2000).

[FN15] Mass.—Fierst v. Laird, 453 Mass. 1016, 904 N.E.2d 771 (2009).

[FN16] D.C.—In re Estate of Tuthill, 754 A.2d 272 (D.C. 2000).

[FN17] Okla.—Shoemaker v. Estate of Freeman, 1998 OK 17, 967 P.2d 871 (Okla. 1998).

[FN18] U.S.—Hadley v. Rinke, 39 F. Supp. 207 (S.D. N.Y. 1941).

[FN19] Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 91 A.2d 393 (1952).

[FN20] U.S.—Botsford v. Riddell, 283 F.2d 298 (9th Cir. 1960).

[FN21] Del.—Roos v. Roos, 42 Del. Ch. 40, 203 A.2d 140 (1964).

[FN22] Ind.—Colbo v. Buyer, 235 Ind. 518, 134 N.E.2d 45 (1956).

Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 90 A.2d 194 (1952), opinion modified on other grounds, 200 Md. 491, 91 A.2d 393 (1952).

[FN23] Md.—Liberty Trust Co. v. Weber, 200 Md. 491, 90 A.2d 194 (1952), opinion modified on other grounds, 200 Md. 491, 91 A.2d 393 (1952).

[FN24] Ind.—Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E.2d 1191 (Ind. 2008).

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II. Creation, Existence, and Validity
A. Express Trusts
8. Cancellation, Reformation, Modification, and Revocation
b. Modification

Topic Summary References Correlation Table

§ 93. Generally

West's Key Number Digest

West's Key Number Digest, Trusts 58

The same principles apply to modification of a trust as to its revocation. A modification of an inter vivos deed of trust must be plain and unequivocal.

The same principles are applicable to the modification of a trust as are applicable to its revocation.[FN1] Any modification of an inter vivos deed of trust must be in plain and unequivocal language.[FN2] A trust agreement which is not indefinite or ambiguous is not subject to clarification by supplementary agreement between one of the trust settlors and the trustee.[FN3]

Modification of a trust must generally protect the interests of all the beneficiaries, including contingent or remainder beneficiaries.[FN4] Moreover, a state's trust statute may set forth a public policy of protecting a trust instrument from any modification or termination contrary to the settlor's clearly expressed intent.[FN5] A trust cannot be impaired for any purpose other than the purpose of the trust.[FN6] The effect of a statute may be such that a trust under seal cannot be modified by an unsealed instrument.[FN7]

A settlor has the inherent power to add property to his or her trust with or without a reservation of such right.[FN8]

Uniform Trust Code.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[FN9]

[FN1] Mass.—Trager v. Schwartz, 345 Mass. 653, 189 N.E.2d 509 (1963).

N.Y.—In re Balsam's Trust, 58 Misc. 2d 672, 296 N.Y.S.2d 969 (Sup 1968).

N.C.—Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

As to modification of charitable trusts, see C.J.S., Charities §§ 45 to 56, 78.

As to revocation, see §§ 99 to 112.

Irrevocable trust subject to amendment

Wash.—First Interstate Bank of Washington v. Lindberg, 49 Wash. App. 788, 746 P.2d 333 (Div. 2 1987).

[FN2] Ill.—Mortimer v. Mortimer, 6 Ill. App. 3d 217, 285 N.E.2d 542 (1st Dist. 1972).

Wash.—In re Button's Estate, 79 Wash. 2d 849, 490 P.2d 731, 47 A.L.R.3d 352 (1971).

Modification by will or otherwise

N.Y.—Matter of Cord's Estate, 58 N.Y.2d 539, 462 N.Y.S.2d 622, 449 N.E.2d 402 (1983).

[FN3] Kan.—Bayless v. Wheeler Kelly Hagny Trust Co., 153 Kan. 81, 109 P.2d 108 (1941).

[FN4] Ga.—Friedman v. Teplis, 268 Ga. 721, 492 S.E.2d 885 (1997).

[FN5] La.—Albritton v. Albritton, 600 So. 2d 1328 (La. 1992).

[FN6] N.Y.—In re Green's Estate, 271 A.D. 171, 63 N.Y.S.2d 371 (3d Dep't 1946).

[FN7] U.S.—Slade's Estate v. C.I.R., 190 F.2d 689 (2d Cir. 1951).

[FN8] Utah—Leggroan v. Zion's Sav. Bank & Trust Co., 120 Utah 93, 232 P.2d 746 (1951).

[FN9] Unif. Trust Code § 415.

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§ 94. Power of court as to modification

West's Key Number Digest

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Under most authorities, a court possessing equitable powers may modify the terms of a trust to preserve it and carry out the trustor's intent. Such power must be exercised cautiously and only where necessary.

Generally, even a court of equity cannot go beyond the express terms, provisions, and directions of a valid trust[FN1] and thus cannot alter the terms of an instrument creating a trust.[FN2] On the other hand, the doctrine of cy pres and the doctrine of deviation both permit a court to deviate from the express terms of a trust instrument.[FN3] Under the doctrine of deviation, a court can direct or permit a deviation from the terms of a trust where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him or her, compliance would defeat or substantially impair the accomplishment of the purposes of the trust.[FN4] Thus, evidence of tax consequences is generally proper for a trial court to consider when determining whether to modify a trust based on an unanticipated change of circumstances.[FN5] The doctrine of deviation is distinguishable from the doctrine of cy pres in that the doctrine of deviation is applicable to both private and charitable trusts and it is concerned solely with the administration of the trust.[FN6] Further, a court of equity has power to modify the terms of a trust under certain conditions,[FN7] as when necessity or expediency impels it.[FN8] So, independently of the cy pres doctrine,[FN9] a court of equity has the power to modify the terms of a trust in order substantially to carry out the intention,[FN10] or to effectuate the primary purpose,[FN11] of the creator of the trust. For example, a court may modify an irrevocable trust to allow a corporate trustee to be appointed as a sole trustee upon the joint trustee's resignation and to eliminate a trust advisor position, where the material purpose of the trust is frustrated as a result of the joint trustees' inability to work together.[FN12]

In exercising its jurisdiction to modify or alter, the court should have due regard for the intention of the settlor[FN13] and should be exceedingly cautious.[FN14] Courts will exercise such power only when it clearly appears to be necessary,[FN15] and only in extreme cases.[FN16] A court has no authority to modify trust provisions if there is not a compelling reason for modification.[FN17] The power of the court is exercised not to defeat or destroy the trust but to preserve it or the estate.[FN18] The exercise of the power can be justified only by some exigency or emergency which makes the action of the court in a sense indispensable to the preservation of the trust, and the condition or emergency asserted must be one not contemplated by the trustor and which, had it been anticipated, would undoubtedly have been provided for.[FN19] Further, the exigency, contingency, or emergency must relate to, and grow out of, the trust itself or directly affect the corpus thereof or the income therefrom.[FN20] The court has power to do whatever is necessary to preserve a trust from destruction.[FN21]

Whether to modify a trust agreement to conform with a settlor's intent with respect to a marital deduction trust is a matter of state law, which may be resolved by a state court even though its resolution will have federal estate tax consequences.[FN22]

A court may modify a trust on a proper showing of changed conditions occurring after the creation of the trust, if the rights of all the beneficiaries may be protected.[FN23] Additionally, a testamentary trust can be modified, rather than terminated, by a trial court when all the beneficiaries consent.[FN24] In order to determine whether all of the potential beneficiaries of trust have consented to its modification, it is necessary to determine how the trust would be distributed under all possible circumstances.[FN25]

The trust will not be modified, in violation of the settlor's intention, merely because the interest of the parties will be served by doing so[FN26] or because the beneficiaries dislike its provisions.[FN27]

Uniform Trust Code.

The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.[FN28] To the extent practicable, the modification must be made in accordance with the settlor's probable intention.[FN29] The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.[FN30] To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention.[FN31]

[FN1] Mass.—New England Merchants Nat. Bank of Boston v. Kann, 363 Mass. 425, 294 N.E.2d 390 (1973).

As to execution of trust and management of property, generally, see §§ 323 to 604.

[FN2] N.Y.—Brandt v. Continental Bank & Trust Co., 43 N.Y.S.2d 255 (Sup 1943),

judgment aff'd, 267 A.D. 890, 47 N.Y.S.2d 589 (1st Dep't 1944).

[FN3] Ohio—Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 79 Ohio St. 3d 98, 1997-Ohio-402, 679 N.E.2d 1084 (1997).

[FN4] Ohio—Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 79 Ohio St. 3d 98, 1997-Ohio-402, 679 N.E.2d 1084 (1997).

[FN5] Ga.—Friedman v. Teplis, 268 Ga. 721, 492 S.E.2d 885 (1997).

[FN6] Ohio—Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 79 Ohio St. 3d 98, 1997-Ohio-402, 679 N.E.2d 1084 (1997).

Cy pres doctrine distinguished from deviation doctrine

Ill.—Burr v. Brooks, 75 Ill. App. 3d 80, 30 Ill. Dec. 744, 393 N.E.2d 1091 (4th Dist. 1979), judgment aff'd, 83 Ill. 2d 488, 48 Ill. Dec. 200, 416 N.E.2d 231 (1981).

[FN7] Cal.—In re Estate of Traung, 207 Cal. App. 2d 818, 24 Cal. Rptr. 872 (1st Dist. 1962).

[FN8] N.C.—Sigmund Sternberger Foundation, Inc. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

[FN9] Cal.—In re Loring's Estate, 29 Cal. 2d 423, 175 P.2d 524 (1946).

[FN10] Cal.—In re Loring's Estate, 29 Cal. 2d 423, 175 P.2d 524 (1946).

As to modification of charitable trusts, see C.J.S., Charities §§ 45 to 56, 78.

[FN11] N.C.—Stellings v. Autry, 257 N.C. 303, 126 S.E.2d 140 (1962).

Tex.—Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Bd., 430 S.W.2d 107 (Tex. Civ. App. Dallas 1968), writ refused n.r.e., (Feb. 26, 1969).

Need for modification shown

Ga.—Martin v. Martin, 286 Ga. 69, 685 S.E.2d 288 (2009).

Statute allowing for modification

N.C.—State v. Philip Morris USA Inc., 363 N.C. 623, 685 S.E.2d 85 (2009).

[FN12] Mont.—In re Mark K. Eggebrecht Irrevocable Trust, 2000 MT 189, 300 Mont. 409, 4 P.3d 1207 (2000).

[FN13] Ill.—Burr v. Brooks, 75 Ill. App. 3d 80, 30 Ill. Dec. 744, 393 N.E.2d 1091 (4th Dist. 1979), judgment aff'd, 83 Ill. 2d 488, 48 Ill. Dec. 200, 416 N.E.2d 231 (1981).

Directive to sell grantor's home declared void

Mo.—Central Trust Bank v. Scrivner, 963 S.W.2d 383 (Mo. Ct. App. W.D. 1998).

[FN14] Ill.—Stough v. Brach, 395 Ill. 544, 70 N.E.2d 585 (1946).

[FN15] Cal.—Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81, 49 A.L.R.2d 1085 (1st Dist. 1955).

[FN16] Ill.—Stough v. Brach, 395 Ill. 544, 70 N.E.2d 585 (1946).

[FN17] Minn.—In re Ruth Easton Fund, 680 N.W.2d 541 (Minn. Ct. App. 2004).

[FN18] Mo.—St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962).

[FN19] N.C.—Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

[FN20] N.C.—Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

[FN21] S.C.—South Carolina Nat. Bank v. Bonds, 260 S.C. 327, 195 S.E.2d 835, 68 A.L.R.3d 983 (1973).

[FN22] Mass.—DiCarlo v. Mazzarella, 430 Mass. 248, 717 N.E.2d 257 (1999).

[FN23] Cal.—In re Estate of Traung, 207 Cal. App. 2d 818, 24 Cal. Rptr. 872 (1st Dist. 1962).

[FN24] Md.—In re Trust of Lane, 323 Md. 188, 592 A.2d 492 (1991).

[FN25] Md.—In re Trust of Lane, 323 Md. 188, 592 A.2d 492 (1991).

[FN26] Cal.—In re Estate of Traung, 207 Cal. App. 2d 818, 24 Cal. Rptr. 872 (1st Dist. 1962).

N.C.—Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

[FN27] N.C.—Stellings v. Autry, 257 N.C. 303, 126 S.E.2d 140 (1962).

[FN28] Unif. Trust Code § 412(a).

[FN29] Unif. Trust Code § 412(a).

[FN30] Unif. Trust Code § 412(b).

[FN31] Unif. Trust Code § 416.

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